

Public Hearing
STATE WATER RESOURCES CONTROL BOARD
STATE OF CALIFORNIA

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Subject: El Dorado Project Proposed by
El Dorado County Water Agency and El Dorado Irrigation District,
Applications 29919, 29920, 29921 and 29922,
Petition for Partial Assignment of State Filed Application 5645

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Held in
Bonderson Building
Sacramento, California

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Tuesday, October 31, 1995
9:00 a.m.

VOLUME IV

TUESDAY, OCTOBER 31, 1995, 9:00 A.M.

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MR. STUBCHAER: Good morning. Welcome to the last day of the EID, et al., water rights hearing.

Before we proceed with testimony, I want to remind everyone that if you need copies of the transcript, you should contact Alice Book, our court reporter, directly.

The order of proceeding initially today will be the Forest Service direct testimony and cross-examination; Kirkwood Associates remaining witnesses, cross-examination; then EID and the Water Agency's protest of competitive applications; then PG&E; SMUD; Bureau; Cal SPA and El Dorado Citizens for Quality Growth.

So, Mr. Gipsman, are you ready?

MR. GIPSMAN: We are.

MR. VOLKER: Excuse me, Mr. Stubchaer, I wanted to alert the Board that we anticipate rebuttal testimony from Dr. Curry today so that should be factored in.

MR. STUBCHAER: Rebuttal comes at the end. Thank you.

MR. GIPSMAN: Good morning, Mr. Stubchaer and staff. I am pleased to come before you today to represent the interests of the Forest Service in protecting Silver and Caples Lakes, and Lake Aloha.

The U. S. is the owner of the vast majority of lands surrounding Silver and Caples Lakes and Lake Aloha. Since the early 1900s, the Forest Service has continuously exercised its riparian or littoral rights in that land to protect and promote recreation and scenic resources of the area as well as the fish and wildlife resources.

In addition to those rights, the Federal Government has reserved rights to the waters of Lake Aloha by virtue of its inclusion in the Desolation Wilderness Area established on October 10, 1969, Public Law 91-82.

The original applications of El Dorado County Water Agency and El Dorado Irrigation District threatened a pattern of established use of the waters of those lakes that have been going on since the early 1900s.

The recent modifications to those applications have reduced but not eliminated that threat. We appreciate the efforts of El Dorado County and EID to alleviate the concerns expressed by the public and the Forest Service by modifying their applications before the Board.

However, the revised applications contain enough uncertainty for the future that we feel compelled to present additional evidence to the Board about the Forest Service and public use of the waters of those lakes.

In particular, we wonder why El Dorado has not modified their applications to exclude the summer months to be consistent with their statement that they do not need the water from those lakes during the recreation season.

In addition, we question the necessity of a priority date relating back to 1927 that has the potential of threatening to upset the long-standing rights of the public to the use of the waters in those lakes during the recreation season.

You previously heard from Janice Gordon, Resource Officer from the Amador Ranger District of the El Dorado National Forest. She testified as to current use and Forest Service management of the lands adjacent to Silver and Caples Lakes and the importance those lakes have to recreation users.

Ms. Gordon also discussed the consequences to the recreation user if lake levels prior to Labor Day were reduced to post-Labor Day lake levels.

Today we will present evidence of how the Forest Service has historically managed the lands surrounding Silver and Caples Lakes and Lake Aloha. In presenting this testimony, it is our hope that should the Board grant El Dorado's application, it will condition such approval in a manner that protects the public trust values of those three lakes.

At this time, I would like to call Mr. Supernowicz to testify.

MR. STUBCHAER: Please do so. Did Mr. Supernowicz take the pledge?

MR. SUPERNOWICZ: Yes, I did.

DIRECT EXAMINATION

by MR. GIPSMAN:

Q Mr. Supernowicz, will you state your name for the record?

MR. SUPERNOWICZ: A Dana Supernowicz.

Q What is your position with the Forest Service?

A I am Zone Historian for the Forest Service.

Q Are Exhibits 4 and 6 an accurate statement of your qualifications?

A Yes, they are.

Q What is the difference between the two?

A Exhibit 6 is a more detailed account of my resume, my background.

Q Is it Exhibit 3 an accurate statement of the testimony that you submitted to the Board?

A Yes, it is.

Q Do you have any corrections to that statement?

A There's a few minor corrections that I would like to make.

Referring to page 7, paragraph 2, in about the eighth or ninth sentence down -- of course, all life by railroad, and it should read, of course, all link by railroad.

And on page 8, the top paragraph, you can strike -- and this is the first sentence, the end of the present day state route 88; that should read, the Alpine Highway as it was referred to during the early 1900s.

Q With those corrections, is your statement acceptable to you?

A Yes.

Q Very good. Now, in your testimony you will be referring to a map. Could you identify the map that's on the easel over there?

A The map on the easel you should have with our exhibits. It is Exhibit 5 and 5-A. Exhibit 5 refers to the front piece of the map and 5-A refers to the back side of the map, which is the text. The front side of the map,

which was drawn in 1918, was the first public recreation map for the El Dorado National Forest, and it shows recreation use, calls out recreation use within the Forest, and specifically at Silver Lake, Kirkwood Lake, Caples Lake, and Lake Aloha area.

Q The map is impossible to see from back there because of the light. I wonder if you would bring it forward whether it would make any difference.

Now, I want to apologize to the Board and the other parties. In going through our testimony yesterday, we realized that we inadvertently did not copy the back side of the map when we submitted our exhibits, so we have those copies this morning and we are ready to distribute them to the parties for them to look at.

MR. STUBCHAER: I hate to say this, but the Hearing Officer cannot see the map.

MR. GIPSMAN: Would anyone like a copy of the back side of the map?

MR. STUBCHAER: That's fine, thank you.

Are we ready to come back to order?

MR. GIPSMAN: Yes, thank you.

Q Mr. Supernowicz, will you please summarize your statement.

A Recreation use in the El Dorado National Forest began as early as the late 1880s and at that time recreation focused primarily on hunting and fishing activities surrounding the lakes that were to come, Caples Lake, which was referred to as Twin Lakes, and Medley Lake, which later became Lake Aloha, and at Silver Lake.

The El Dorado National Forest was formed in 1910 from portions of Stanislaus National Forest, which dates to 1897, and the Tahoe National Forest which dates to 1905.

In 1906, land was added to the Stanislaus and in later years the Tahoe National Forest. Those lands were split apart again in 1910, which became the El Dorado National Forest.

Management of the forest was primarily a passive management in the early years, but by the teens the Forest Service took a more active role in managing the lands that it administered, and that activity focused on improvements of the roads, transportation, and in recreation as well.

Timber harvesting was a very small part of the forest administration during the early 1900s. Road systems in the early 1900s and the teens were quite poor and that, in essence, limited the kind of activity that occurred around the lakes that are in question at this hearing.

It wasn't until the late teens and early 1920s that the State, along with private concerns and in part the County, began to improve the road systems.

Highway 50 was once the Lincoln Highway and prior to that it was a wagon road, and that was improved in the teens and later in the 1920s, which allowed automobile access.

Highway 88 was once referred to as the Alpine Highway, later becoming, of course, State Route 11, I believe, or something like that, and later was changed to, of course, Highway 88. It was a very poor road and later it was improved to allow automobile access.

At this time, there were a few resorts scattered around the lakes that date to the 1870s. By the teens there were numerous resorts around the lakes that were associated with a new form of recreational use, primarily related to the automobile.

Kay's Resort and Kit Carson Lodge were built in the twenties and early thirties at Silver and Caples Lakes.

As mentioned earlier, the map to my right is the 1960 official map of the El Dorado National Forest. It was the first recreation map produced by the Forest and its intent was to get the public interested in and have the public increase visitation to the Forest.

If you have a copy of the map which is the two sides, the back side which you can't see is the text, and the front, of course, is the map. It shows resorts, it shows improvements associated with Silver Lake, Caples Lake and Lake Aloha, which shows it was already designated as an area of geological interest, and by the 1930s, it became a primitive area and, of course, part of the Desolation Wilderness Area.

The back side of the map talks about fish stocking and it talks in more detail about summer homes, and the map does advertise that summer homes were available on the National Forest at Silver Lake and other locations as early as 1916.

The Term Permit Act of 1915 allowed for the location or development of tracks within the Forest system, and consequently the construction of summer homes, which included homes around Silver Lake.

Reading from various newspapers of the day, Silver Lake was a very popular recreation location, particularly for folks from Stockton and from Amador County. Lake Aloha was also a very popular location as early as the teens for individuals principally from Sacramento, Marysville along the Lincoln Highway route.

And it's frequently mentioned, as you have seen in the testimony, that fishing parties were en route to Silver Lake as soon as the lake opened up in the teens, and that the Forest Service, along with Jackson Guard, the Ladies Improvement Club and the State Hatchery began to participate together to stock Silver Lake, to stock Caples Lake and to stock many of those streams in the Forest for recreational fishing purposes.

As I mentioned earlier, there were resorts located at these lakes.

The Forest Service began to actively manage its resources by providing other services such as campground facilities and trails, and a trail was built in and around Silver Lake as early as the 1920s to access the higher elevations around the lake.

In 1917, Western States Gas and Electric Company, predecessor to PG&E, actually contributed \$1,000 to help build the trail to access Echo and Medley Lakes, and there was participation along with the Forest Service to open up that trail to vacationists and visitors.

Public campgrounds, as I mentioned, date to the early 1920s. There was an unimproved campground in Silver Lake as

early as 1922 on the east side of the lake, and that, of course, developed in later years into the present campgrounds today.

Summer home construction began around Silver Lake in the early 1920s and the permits were issued beginning in 1922 and following through the 1930s on both the east shore of the lake and the west shore of the lake.

At the same time, there were municipal camps that opened up within the Forest Service. The one camp opened up at Silver Lake on the west shore of the lake called Stockton Municipal Camp and that developed between 1921 and 1924, and that was a permit that was exercised by the City of Stockton to bring up youth and individuals to recreate in the outdoors and to use the waters of the lake.

A similar camp was opened on Highway 50 called Camp Sacramento. Summer home construction continued through the 1930s around Silver Lake and those individuals selected the tracts along Silver Lake principally for its recreational values and for camping, fishing, and just enjoying the pleasures of outdoor recreation.

By the 1930s the road had improved to Silver Lake, Alpine Highway essentially had improved and a road was constructed down to Plasse's Resort in the twenties and was improved in the thirties, so access was much easier from the upper elevation of the lake, basically the north side of the lake, down to the lakeshore, providing for more automobiles and expanding services at the lake, particularly increasing recreation use of the lake.

This recreation use increased through the 1930s, including Desolation Area which was designated primitive area in the 1930s, and hiking and camping occurred in that area with minor improvements. A fish dam was built at the end of Lake Aloha in the late 1920s, early 1930s for fish habitat, and there were other fish dams built on the forest through fishing clubs, principally out of the Stockton area.

World War II led to increases in recreation use throughout the National Forest land and a stronger emphasis by the Forest Service to expand its recreation facilities.

The individuals that were on leave during the war often used the lands within the Forest to recreate in and there was a need to improve road systems and improve recreational facilities, in particular campgrounds.

By the 1940s there were about 15 campgrounds along US 50 and about half a dozen or more along State Highway 88.

Camp Minkalo, Stockton Muni Camp, Silverado Camp were all located at Silver Lake. Camp Minkalo was a Campfire Girls camp and Silverado was basically for Boy Scouts. There were other interested individuals that also had camps there for a short period of time, but by the 1940s and certainly by the 1950s, Silver Lake was a major destination point for recreationists and for the general public, and the --

MR. STUBCHAER: You have about a minute and a half.

A And the Forest Service took a very active role in its administration at that time. Caples Lake never had a campground, so you dispersed camping along the shores with recreation provided by private permittees and private

landowners, and of course, Lake Aloha eventually became part of the wilderness area and it remained somewhat primitive, although heavily used by hikers and so forth.

In summary, recreation use has occurred throughout the past 60 years at all three lakes. They were very important locations for hikers, fishermen, campers and recreationists, and their aesthetic beauty and resources were an important management issue concern for the Forest Service as they are today.

MR. GIPSMAN: That concludes our direct testimony.

MR. STUBCHAER: All right. Who wishes to cross-examine this panel? I see three. Anyone else?

Okay, Mr. Somach.

CROSS-EXAMINATION

by MR. SOMACH:

Q I am not sure you are the right person to ask this question now, but you are the only person here from the Forest Service.

Is the Forest Service asserting a Federal reserve water right for waters in any of the lakes?

MR. GIPSMAN: Objection, outside the scope of the direct testimony.

MR. TAYLOR: Under our rules, the scope of cross-examination is pretty broad. If your witness can answer the question, we would appreciate hearing the answer.

A In my research, my focus was principally on land use and recreation use rather than issues relating directly to water rights, so I can't answer.

MR. SOMACH: Q If you take a look at page 2 of your written testimony, the first full paragraph on that page, there's a discussion of the construction of dams. Do you see that?

A Yes.

Q Were these Forest Service dams?

A No, they were not.

Q Did the Forest Service participate in the construction of those dams?

A I am not aware that they did.

Q Did the Forest Service provide any financial support for the construction of those dams?

A I am not aware that they did.

Q Take a look at the last sentence of that same paragraph. It says: Expansion of each led to increased recreational opportunity, but also resulted in decreases to grazing land which lay within the area inundated by increased lake levels.

Were the dams used for other purposes besides recreation?

A Well, that sentence describes the situation whereby these lakes were either smaller or divided lakes, Caples being Twin Lakes; Lake Aloha being Devil's Lake and Medley Lake; and expansion increased the volume of the water, of course, and inundated areas that were grazed upon.

The only land uses that I am aware of other than recreation associated with the lakes was grazing.

Q Take a look down a little bit further. You see where you have the subheading called Historic Context?

A Yes.

Q Do you see the last sentence in that first paragraph there?

A Yes, I do.

Q If I could read that: It was only after construction of the series of dams that the current water level was reached, flooding an area that was once a long narrow valley.

And if I can have you take a look at page 9, take a look at the paragraph that starts, Wild recreation -- do you see that?

A Yes.

Q The last sentence there reports on Friday, August 24, 1917, the Amador ledger provided the following report, that construction work was already begun on the new dam?

A Yes.

Q In combination, these paragraphs, dealing with dams, in particular the sentence at the end of that first operating under Historic Context, talks about the construction of dams that allowed the lakes to reach their current water levels.

Is the use of those lakes at their current water levels solely for the purpose of recreation?

MR. GIPSMAN: I am going to object. The question is vague and ambiguous. If Mr. Somach could clarify at what point in time he is talking about.

MR. STUBCHAER: The general thrust of the question is okay, if you want to clarify it, Mr. Somach.

MR. SOMACH: Q Well, I have what is purported to be a history and the lakes are discussed to the extent of their current levels, and the use of the lakes is discussed with respect to recreation exclusively, and the question I have is, in your historic research, did you find any historic information that the lakes were used for other purposes besides recreation?

A The information that I found through newspaper sources and so forth, suggested that the principal use was recreation use of the waters of the lakes. Other uses occurred when the water was taken from the lakes, but that was not something that I was looking for nor that I see on a regular basis mentioned in the local newspapers.

Q Take a look at -- what is this exhibit?

MR. GIPSMAN: 580.

MR. SOMACH: 580.

MR. STUBCHAER: Mr. Somach, while you are referring to that, I better ask if anybody objects to the late submittal of this late piece of evidence.

MR. SOMACH: I don't object.

MR. STUBCHAER: Does anyone? Okay.

MR. SOMACH: Q On the back there's a note that says to the public. Do you see that?

A Yes, I do.

Q Okay, and let me look at yours and see how it is -- there is a paragraph there that is under physiography, geography and resources, and it is the second paragraph and it says the El Dorado Forest is commercially valuable chiefly for its timber-grazing areas and water power.

Is that an accurate reading of what's there?

A That's correct.

Q And in the context of water power, in your historic research, do you believe that that water power related to any of the lakes that are the subject of this hearing here today?

A I assume it probably did, but it didn't specify where it was.

MR. SOMACH: I have no further questions.

MR. STUBCHAER: All right. Mr. Volker.

CROSS-EXAMINATION

by MR. VOLKER:

Q Good morning, Mr. Supernowicz.

A Good morning.

Q I was curious whether in your historic review you came across documentation of the existence of a Boy Scouts camp at Caples Lake in the 1960s?

A No, I did not.

Q I put personal emphasis on that camp. I was present at that camp on the west shore. I learned to canoe there.

I had a question about Silver Lake. Was Silver Lake raised to within a few feet of the current level in the 1870s?

A Dams would be built on the Silver Lake in the early 1870s. In fact, there was a dam, according to the evidence that I examined, built in the 1850s. The levels of the lake are rather unclear to me in terms of the height of the dam and fluctuations of the water levels. I honestly don't know.

Q And the lake that was present as a result of those dams was in existence prior to the creation of the Stanislaus Forest Reserve in 1897?

A Correct.

MR. VOLKER: Thank you, no further questions.

MR. STUBCHAER: Mr. Moss.

CROSS-EXAMINATION

by MR. MOSS:

Q Does the Forest Service supply consumptive water to its lessees?

MR. GIPSMAN: Objection, outside the scope of the direct examination.

MR. STUBCHAER: I am going to overrule the objection.

A Yes, it does.

MR. MOSS: Q And can you give us a little bit more detail about the Forest Service supplying consumptive water to its lessees?

A I don't have the information to talk about the policy. Suffice to say that summer homes and other permittees' resorts and so forth do have consumptive rights, appropriative rights in terms of springs and riparian drainages, and there are water rights to summer-home tracts at Silver Lake and the various other tracts along Highway 50.

Q Based on what principles of water law?

A I don't have the information.

Q Is it the position of the Forest Service that its lessees can take water without complying with the provisions

of the California Water Code that sets forth the manner for appropriation of water?

MR. GIPSMAN: Objection. That is outside the scope of the direct testimony and I don't believe it is within the area of expertise of the witness.

MR. STUBCHAER: The latter objection might have some merit.

Mr. Moss, do you wish to comment?

MR. MOSS: Well, basically the witness has testified that permittees are, in fact, appropriating water and I am curious within at least the formal documents of their permit, whether it gives them instructions to do so or any guidance, or tells them to come before the Board and seek an appropriation of water.

MR. GIPSMAN: I heard the witness's testimony. I am not sure he was testifying they were using water in a legal sense. They were using water.

MR. STUBCHAER: I would say to the extent you can answer the question, please answer.

A There were water rights granted permittees that are included as part of a permit, and that's as far as I really know. As far as I really know in terms of the legalistic issue about that, I can't answer that, but there were water rights granted.

Q Now, are all the lands on which you are claiming riparian rights, are they all patented?

MR. GIPSMAN: Again, this witness has not testified to --

MR. STUBCHAER: I agree there is no foundation. I didn't hear him say they were claiming riparian rights.

MR. MOSS: In the opening statement, they claimed both reserved and riparian rights, so I am curious whether, in fact, in the areas that they have claimed riparian rights, if the land is patented.

MR. GIPSMAN: That was a policy statement. This witness is testifying as an expert of historical management.

MR. STUBCHAER: If he can't answer, he can state he can't answer.

Mr. Taylor, do you want to say something?

MR. TAYLOR: Cross-examination is not limited to the scope of the direct examination in proceedings before this Board.

MR. GIPSMAN: I understand, but there has to be some fairness. It has to stay within the bounds of the witness's expertise. He is asking him questions he is not an expert in.

MR. TAYLOR: I appreciate that, but if your witness has the answer and is capable of answering, then I think we would like to hear the answer, and if he is less than comfortable testifying, he should say so and say why.

A I can't answer that.

MR. MOSS: Q So, in your historical review, you have not reviewed the question of the patenting of land within the Forest. That is not an area that you have been in?

A I have reviewed in a cursory sense the patenting of land in the Forest, but not specific to the issues at hand today.

Q Okay. Could I ask you a question following Mr. Somach, and perhaps this is the same answer.

Have you attempted to quantify in any way the claim of reserved rights?

A No, I have not.

MR. MOSS: Thank you.

MR. STUBCHAER: Thank you, Mr. Moss. Staff?

MR. TAYLOR: No questions.

MR. STUBCHAER: Any redirect?

MR. GIPSMAN: No.

MR. STUBCHAER: Do you want to offer your exhibits?

MR. GIPSMAN: Yes. At this time, we would like to move for the admission of Exhibits 1 through 6. That would include 5 and Exhibits 4 and 6 are statements of qualifications of Mr. Supernowicz. No. 6 is a more complete version so, therefore, we would only move for the admission of 6 and not 4, so that would leave 3, 5, 5-A and 6.

Also, there are Exhibits 1 and 2. Exhibit 1 is the Master Title Plaque Index showing the U.S. ownership of lands in and around Caples Lake. No. 2 is the explanation of how to read that map. Those are official government documents and we would ask that the Board take official notice of those exhibits as well.

So, therefore, we would move for the admission of 1, 2, 3, 5, 5-A and 6.

MR. STUBCHAER: Any objections? Hearing none, they are accepted.

MR. GIPSMAN: Thank you.

MR. STUBCHAER: All right, Kirkwood Associates, Ms. Lennihan.

MS. LENNIHAN: Good morning. On behalf of Kirkwood Associates, we are here to provide you with a description of our case, our affirmative case in support of our water rights applications, and also, a petition for partial assignment of the State-filed Application 5645, which is identified as Folder 11.

I am going to start with a brief opening statement and then do a few housekeeping items, and then I will call three panels of witnesses today.

Kirkwood Associates operates a ski area south of Lake Tahoe and in a basin adjacent to the town of Kirkwood in the mountains off Highway 88.

We have heard considerable testimony already and you can see the general location of the Kirkwood place of use and the ski area on the map which is Kirkwood 6-C in the back of the room.

The ski slopes at issue are located primarily in Alpine County. A small portion is in the easternmost adjacent Amador County. The ski area is located a very few miles from Caples Lake, which is one of the high Sierra lakes at issue in this proceeding.

The drainage of the portion of the ski area which is at issue is all into Kirkwood Creek, which is then tributary to Caples Creek, and thence to the Silver Fork.

Alpine County itself has a relatively small population. You are going to hear testimony regarding the

Alpine County's -- regarding Kirkwood's applications and regarding the financial role which Kirkwood plays in the County itself, as well as in the County of Amador.

Like many mountainous counties, it has very few sources of employment and also of development.

The evidence is going to show that the Kirkwood ski area is a large source of both employment and financial support to the County itself, and also, to the residents of the County. The ski area, in fact, is the largest municipal user within the boundaries of the Kirkwood Meadows Public Utility District, the provider of sewer and water service in the area.

The ski area is also the primary support system for surrounding municipal uses. Kirkwood ski area is, of course, best known for the recreational opportunities that it provides.

An average of 280,000 people a year go to Kirkwood Meadows to ski. The ski area is located on both public and private land. The U. S. Forest Service, in fact, which just testified, has dedicated a substantial acreage of National Forest land to the ski area and they have been developed as such.

Kirkwood at this point is the only California ski area of its size and character which does not have a snow-making system. In fact, most ski areas, as the testimony will show, now makes snow and the ability to make artificial snow has become a market requirement for the survival of such a ski area.

Last year, in 1994, Kirkwood Associates discovered this fact in a rather painful manner. The ski area went through bankruptcy. It has recently emerged with a decision that it must install snow-making in order to avoid a repeat of the financial crisis which occurred and which threatened its very existence.

Kirkwood has invested alternative water supplies in order to support the snow-making system. The original plan, in fact, was to use in part groundwater resources; however, after substantial investment discovered that those resources have come up virtually dry.

The surface water resource for which Kirkwood has applied to the State Water Resources Control Board is the only viable alternative for it to proceed with a snow-making system.

Kirkwood needs a maximum amount of 500 acre-feet for 200 acres of ski trails.

One fact which I want to make clear at the onset is the difference, which is a marked difference, between snow-making and many of the other proposed water uses. First, the volume does not increase regularly over time to a relatively fixed maximum. The need fluctuates perpetually with the weather and, in fact, the need is driven not solely by dry year versus normal year versus wet year, but by dry fall periods.

For example, the year may be normal or wet, but if the fall is dry, there will be a need for water for snow making in order to open the ski area in a timely manner.

The most useful figure, therefore, when you look at

the Kirkwood applications is not the maximum of 500. Kirkwood needs the maximum of 500, but the most useful figure is the average of 250 acre-feet. That average is set forth and the schedule which is expected to be used is in detail in the Final EIR for the project.

The second unique feature of this snow-making use is that it is virtually nonconsumptive. Approximately 94 percent of the water which Kirkwood would divert and use will return to the system for reuse by others downstream. This, in fact, is a remarkable benefit in a very competitive situation for water. The same supply of water can be put to use for snow making and then be reused multiple times downstream.

This use of water for snow making would generate substantial benefits which are vitally important as the testimony will show to the County and the area of origin which generates this water.

On average, only about 15 acre-feet of water will be used for snow making consumptively.

In spite of this very small volume and the benefits which are relying upon its use, Kirkwood's applications have been much more difficult to pursue because of the dispute over the El Dorado applications. As a result, Kirkwood has prepared for the Board a more in-depth case than, frankly, probably would have been required under other circumstances.

This analysis shows that virtually all of the time Kirkwood's diversions can be accomplished with no injury to any other water user.

Now, I say that without regard to the legal debate over who has prior rights. I say that because it's important to understand that this use can proceed without any physical injury to any other users. Again, it is unique in this respect. At worst, the injury would be de minimis.

Snow-making use is, therefore, remarkably compatible with the other existing uses on the system. We believe that the evidence will demonstrate this no impact or at worst, de minimis impact, and the evidence will also show how valuable this water use is to the Kirkwood Associates as a company to the ski area, the recreational users and to the community as well as to the Counties of Alpine and Amador.

With that, I would like to turn for a moment to a few housekeeping items. We would like to provide the Board with an update regarding Kirkwood's settlement discussions before we proceed with our witnesses, and with your permission, I would like to introduce some evidence on this topic.

First of all, Kirkwood has reached settlement with El Dorado Irrigation District and the El Dorado County Water Agency, as you heard earlier in this proceeding. Last week Mr. Alcott testified, I think it was on redirect, regarding the nature of that settlement, and while I am sure that testimony was a good-faith effort to describe the settlement, there were a few variations.

Therefore, we are going to ask that the Board rely on the documents that are now being submitted to characterize that settlement.

I have two exhibits here. One is Kirkwood Exhibit 16, which reflects the settlement which Kirkwood has reached

with the Sacramento Municipal Utility District. I am going to distribute those now. Kirkwood Exhibit 17 reflects the settlement agreement with the El Dorado Irrigation District and El Dorado County Water Agency.

All of the details have been finalized and I think we are in agreement. I am going to give to you, Mr. Taylor, the original, which is addressed to Walt Pettit.

I would also like to note that we have one witness whose name is Doranna Glettig. Her testimony is Kirkwood Exhibit 8, and I have replacement copies because she is testifying in lieu of Marilyn McKenzie. We provided notice to the participants and to the Board staff earlier. I just want to make sure that everyone has these replacement copies.

There should not be any prejudice to any participants because, in fact, Ms. Glettig will be testifying to virtually the same testimony as Ms. McKenzie was submitting. The only difference is that the amount of tax revenue which the Kirkwood ski area generates for Alpine County is, in fact, 20 percent to the County's tax income rather than the 10 percent originally reported.

So, I am going to make available these replacement copies to make sure everyone has the right version.

Please note that Exhibit 8-C has been omitted.

MR. TAYLOR: When you say 8-C is going to be omitted, you mean you do not intend to introduce it or use the one you previously submitted?

MS. LENNIHAN: I do not intend to introduce it.

And finally, we have an errata sheet which is just typographical errors which I will make available.

With that, unless there are questions, Mr. Stubchaer or staff, I would like to proceed with our witnesses.

MR. STUBCHAER: Any questions? All right, please proceed.

MS. LENNIHAN: The first panel that we are going to call is witnesses Tim Cohee, Penn Tirschman and Joseph Broadhurst. Their testimony is Kirkwood 1, 1-A, 2, 2-A, 2-B, 3 and 3-A.

MR. STUBCHAER: Have all your witnesses taken the pledge?

MS. LENNIHAN: That is true of this panel. In fact, we will probably need to administer the pledge for subsequent panels.

DIRECT EXAMINATION

by MS. LENNIHAN:

Q Mr. Cohee, would you please state your name and business address.

MR. COHEE: A Timothy M. Cohee. My address is P. O. Box 1, Kirkwood, California, 95646.

Q Mr. Cohee, are Exhibits KW 1 and the attachment, KW 1-A, which contains your qualifications, true and correct copies?

A Yes.

Q Would you please describe for us your experience with snow making prior to joining the Kirkwood ski area?

A Yes. My ski background dates back to the mid-seventies, 22 or 23 years now, and I started the management

business back in about 1979, and have spent from 1979 through 1993, approximately 14 years or so, at some of the larger, more distinguished resorts in North America that are also the leading snow-making resorts in North America.

Q Kirkwood has asked that the Water Board issue permits to allow Kirkwood to divert, store and use water for snow making. Can you explain why Kirkwood needs a snow-making system?

A The sky business over the past probably about ten years or so as a recreational activity in this country and in the world has changed dramatically. What has changed most dramatically about the business is that there are virtually no major resorts left, certainly not in North America, that rely exclusively on natural snow.

Anybody who has enjoyed skiing over their life or has been involved with the ski business at all, knows that the fluctuations of a ski business are dramatic and probably that became even far more evident by about the middle eighties when we were hit with a series of low snow years, and at that time, most of the major resorts in the U. S. And Canada moved to producing snow to even out the highs and lows.

The biggest effect that snow making has is early season and probably there is no more dramatic example of how dramatic it is than to take a look at our resort, Kirkwood, where if you take just the last 12 years or so of our operation, if you take the 6 years where we received snow early enough to be open and operating, and you take the 6 years when we were not, when we were late or that we did not have very much snow, the difference is approximately 90,000 visitors in the 6 years that we did and 30,000 visitors in the years we did not, and I can tell you that anybody who would be sitting here operating a ski resort today, that the margin of profit built into our business is nowhere near that high.

So, to make a long story short on the numbers, if you're moving into January after a November and December that mirrors those first low six years, you are pretty much out of business for the year. Your hopes of showing any profit at all are zero.

Q Mr. Cohee, is it true then that a snow-making system which would be supported by these water rights is essential for the survival of the Kirkwood ski area?

A Yes. As Ms. Lennihan mentioned a few minutes ago, the drama of lack of snow making came to its height here a few years ago, and after a series of very tough years, the company just about a year ago, approximately a year ago, 11 months or a year ago, filed and completed a consensual Chapter 11 with a restructuring beginning January of this year with a whole new ownership structure after a lawsuit of several million dollars with existing owners.

It is certainly clear to us and the ownership group that the continued operation of the resort is virtually impossible without snow making. The risks of a year like '91, or a '92 or an '87 are so great that the losses exceed by a very wide margin any hopes of profitability and, therefore, what the snow making does is lend support to the November and December months which are so critical, I guess you would say, to getting out the blocks in our business, in

the skiing. The momentum is a huge issue.

One of the other significant numbers that I think speaks to how dramatic and how critical the situation is, is when you once again look at those top six years representing 1983 to 1995, the difference in ski visitation is a difference of 135,000 people a year on average of the big years versus the small years, and once again, the small numbers are so dramatically low that they eliminate any chance of survival in those years.

One cannot really look at averages in the ski business. Unfortunately, the highs are not high enough, not so high that they cover the lows, so one really needs to look at things more on a year-to-year basis, which is what happened to Kirkwood, that the good years have been okay but the bad years have been so bad that they have forced the company into the position that we were in less than 12 months ago.

DIRECT EXAMINATION

by MS. LENNIHAN:

Q Ms. Tirschman, will you state your name for the record.

MS. TIRSCHMAN: A Penny Tirschman.

Q Is Exhibit KW 2 and the attachment thereto true and correct copies of your testimony and qualifications?

A Yes, they are.

Q Can you describe what your role is at Kirkwood?

A I am Project Manager for Kirkwood and in that position I am responsible for numerous projects within the valley, on the mountain and the private lands. I see those projects through planning, permitting and implementation.

I am also Kirkwood's governmental liaison, which means that I handle our permitting issues which can be quite complex given the fact that we are operating under a special ease permit from the Forest Service and are also located within three separate Counties, Alpine, El Dorado and Amador.

Q Ms. Tirschman, can you summarize the testimony that you provided in writing to the Board?

A Yes, I can.

I would like to start by referencing back to Tim that the reason it was decided we needed to apply for water rights for snow making was so that the company could survive, not succeed but survive, and survival meant not just surviving for the company, but survival for the community of which we are a part.

The Public Utility District which services us with water and sewer facilities is heavily dependent upon Kirkwood Associates for its revenues. Kirkwood is 44 percent of the district's annual metered water and sewer revenues, and so, therefore, if the company is to fail, a good portion of the community will be affected also.

The reason we chose 500 acre-feet and the reason we feel we need 500 acre-feet of water to make snow is because we feel from a snow-making standpoint we need to be able to make snow on 200 acres of skiing terrain. Five hundred acre-feet of water translates to 2-1/2 feet of water per acre of skiing terrain, which basically translates into 5

feet of artificial snow.

I wanted to move to an enlarged copy of Exhibit 2-B. This map is, like I said, an enlarged copy of Exhibit 2-B and it demonstrates what our project is.

What our project is proposed to be is Caples Lake is located up here.

MR. STUBCHAER: There is going to be a written record, so up here means near the top of the map.

A Near the top of the map. Caples Lake is located to the upper right-hand corner of the map. Our proposal is to place a submerged intake in that lake and then through buried pipeline bring it around the spillway outside the Caltrans Highway 88 right-of-way along Forest Service lands and into the private property of the boundary of Kirkwood, which is shown by the black line. That route will follow the east side of the valley within subdivisions that have already been built and there are easements available.

That pipeline follows the east side of the valley to the south end of the valley where it will then go either into the air/water distribution system for the snow-making plant or will go up to an excavated pit-type reservoir that we propose to construct near the top of our mountain.

In red I have highlighted the ski trails which we are proposing to make snow on. Those trails are a mixture of beginning, intermediate and expert skiing terrain, so we can offer the product that the skiing public demands.

I would like to add that Kirkwood, as Martha made reference to, tried to drill several wells in various spots, one of them being within the valley proper, another being on Forest Service land, to try to generate groundwater in order to make snow, and those were unsuccessful.

One of the wells virtually had no water, less than one gallon per minute. The other well is producing approximately 40 gallons per minute, but does not meet State drinking water requirements.

So, it's become apparent to us that the water out of Caples Lake is really our only available source of water and is in near proximity to Kirkwood, so it is a logical source.

Q Ms. Tirschman, have you reviewed the updated State Water Plan as it relates to Kirkwood's proposed snow-making use?

A Yes, I have, and it's my feeling that in reviewing that, that Kirkwood and its snow-making use is a use that is suggested as a beneficial use under the State Water Plan in that it is a water-based recreational use.

Q Ms. Tirschman, has Kirkwood withdrawn its protest to the El Dorado applications?

A Yes, we have reached an agreement with El Dorado County and EID in which it has been agreed that if and when EID or El Dorado County takes over ownership of Project 184, that they will reserve 500 acre-feet of water for diversion pursuant to any permits that may be issued by this Board.

DIRECT EXAMINATION

by MS. LENNIHAN:

Q Mr. Broadhurst, you have taken the pledge; have you not?

MR. BROADHURST: A Yes, I have.

Q Will you please state your name for the record.

A My name is Joseph Broadhurst.

Q Are Exhibits KW 3 and KW 3-A true and correct copies of your testimony and qualifications?

A Yes, they are.

Q Will you describe your role at Kirkwood ski area and summarize your testimony?

A Yes. I am the Vice President and Director of the mountain operations. Basically I operate all the outdoor activities that have anything to do with skiing, approximately seven work centers and upwards of 250 employees who operate the ski area.

I have been involved in this business for 23 years at Kirkwood, so I have operated the ski area in some manner in every one of the seasons, and opening the ski area every year is the most critical time.

We provide employment to upwards of 500 for the total ski area every year, and if we do open without an adequate snow cover to continue in operation, then these people face a layoff and we are severely disadvantaged in reopening and continuing to operate.

So that speaks to the fact that we really do need a snow-making system in order to have a consistent season every year.

In most years, the snow-making system would provide enough snow to open for Thanksgiving. That would be the goal every year. This would usually be accomplished by supplementing natural snow, but there would be some years when artificial snow would be the only surface upon which we would be able to operate.

The Kirkwood area is located at 7800 feet of altitude. It generally has cold temperatures and dry temperatures which are conducive to making snow, so that it is a viable location for a snow-making system.

There's two ways of making snow. The first is an air/water system which mixes highly compressed air and high volumes of water. This is very effective and it can produce a large amount of snow if the temperatures and humidity are appropriate.

The second method is called airless, somewhat of a misnomer in that it doesn't use compressed air, but the air is provided by a fan and helps nucleate the water. The water goes out into the air and is atomized, nucleates and freezes and falls to the ground as snow.

The second system, the airless, is more quiet and would be applied in and around residential areas to provide a quieter system. The system would be designed to pump 3,000 gallons per minute at maximum capacity and that would be dictated, of course, by weather conditions, everything from wind, time of day, what trails were open and operating, and of course, temperature and humidity.

And in order to provide flexibility it may be necessary to have a small storage reservoir on the mountain that would have a maximum capacity of six acre-feet. It would be a pit-type reservoir, and at times we would draw water from that in order to take advantage of particularly favorable conditions and not to have to increase the draw

from the lake.

It would also provide some cushion if there was a break in the pipeline or some mechanical problem with the pumps from Caples Lake.

In October of every year, it would be a management decision on when to start snow-making operations with the goal of getting open by Thanksgiving, and in most years, mid to late December would end the snow-making system for the year with the arrival of the usual Sierra storms.

Some years the snow-making system may not be operated at all. For example, last year we probably would have made snow for four nights and only then because we didn't know what was coming around the corner, but in a year like 1990 or 1991, we would have operated a snow-making system for every night from November through February. In every favorable window that we had during that time we would have operated and we would have used the full 500 acre-feet on a year like that.

Q Mr. Broadhurst, you mentioned that this would be a pit-type reservoir that would be up on the mountain. Was the capacity of that 62 acre-feet?

A No, a maximum of 6 acre-feet, I think.

MS. TIRSCHMAN: Sixty-two acre-feet.

Q I think we need to correct that for the record. So the capacity is 62 acre-feet; is that correct?

A Yes.

MS. LENNIHAN: Thank you.

I would now offer these witnesses for cross-examination.

MR. STUBCHAER: All right. Who wishes to cross-examine this panel?

MR. BAIOCCHI: Mr. Chairman, I had indicated earlier that I wanted to cross-examine the witnesses. We do not want to cross-examine the witnesses at this time.

MR. STUBCHAER: All right.

Mr. Moss.

CROSS-EXAMINATION

by MR. MOSS:

Q Just a couple of questions and any member of the panel can answer.

Are you aware of PG&E's FERC license and ownership of Caples Lake?

MS. TIRSCHMAN: A Yes, we are.

Q And you acknowledge that for you to be able to install the pumps and other facilities that you seek here, you will have to reach agreement with Pacific Gas & Electric Company?

MS. LENNIHAN: Objection. That asks for a legal conclusion.

MR. MOSS: I think the witnesses can answer.

MR. STUBCHAER: I would say answer to the best of your ability.

A We understand that FERC does have some requirements on the project, however, I am not specifically aware to what extent we will need to receive approval from FERC.

MR. MOSS: Q And in your evaluation of the diversion of water from the lake, did you attempt to quantify what

potential losses by time could occur to the licensee of Project 184?

MS. LENNIHAN: Objection. We do have a subsequent witness who is a hydrologist who would be more appropriate for that question.

MR. MOSS: I will hold that.

Q Lastly, do you acknowledge that, in fact, you are presently in negotiation and will seek to, in fact, reach agreement with PG&E to allow the diversion of water from Caples Lake?

MR. COHEE: A Yes.

MR. MOSS: Thank you.

MR. STUBCHAER: Mr. Turner.

MR. TURNER: Mr. Stubchaer, I think Ms. Lennihan's hydrologist being available later to talk about the impacts of the settlement agreement would answer the questions I have. I will withhold on my cross-examination until that particular witness is available.

MR. STUBCHAER: Does staff have any questions?

E X A M I N A T I O N

by MR. TAYLOR:

Q I only have a couple of questions to try to clear up a discrepancy between the exhibit which is KW 2-B, from which Ms. Tirschman spoke and the one that is provided in our package of reduced exhibits. There are one or two differences in that exhibit and the one that was submitted to the Board and the parties.

One, there is an indication on the large blow-up that there are solid red lines which reflect ski runs, that those lines do not appear in our black and white.

What I would like, Ms. Tirschman, is do those lines generally coincide with the black lines in the reduced exhibit which indicates snow-making pipelines?

MS. TIRSCHMAN: A Yes, they do. The red lines merely highlighted the trails on which snow making would occur. The pipelines are located next to and right on those.

Q Is there any other difference between your enlargement and the reduced exhibit which should be noted for the record?

A Not that I am aware of.

MR. TAYLOR: Thank you.

MR. STUBCHAER: Mr. Canaday.

E X A M I N A T I O N

by MR. CANADAY:

Q This is for any member of the panel.

Is the diversion from Caples Lake and the diversion works, is that going to be jointly held by Kirkwood Public Utility District?

MS. TIRSCHMAN: A That is not decided yet.

Q You are prepared to go ahead with the project in any case?

A Yes, we are.

MR. STUBCHAER: Any redirect?

MS. LENNIHAN: No, thank you.

MR. STUBCHAER: Thank you.

MS. LENNIHAN: Our second panel is Charles Simpson,

Diane Moore and Bob Wagner.

MR. STUBCHAER: You said we need to administer the pledge?

MS. LENNIHAN: Yes.

(Thereupon Charles Simpson, Diane Moore and Robert Wagner were administered the pledge.)

DIRECT EXAMINATION

by MS. LENNIHAN:

Q Mr. Simpson, I would like to start with you. Would you please state your name for the record.

MR. SIMPSON: A My name is Charles Simpson.

Q Are Exhibits KW 4 and the attachments thereto, KW 4-A through 4-C, true and correct copies of your testimony and qualifications?

A Yes, they are.

Q Mr. Simpson, will you describe what your role was in evaluation of the Kirkwood snow-making project?

A Yes. I was retained, or my firm Simpson Environmental was retained by the County of Alpine to prepare CEQA and NEPA environmental compliance documents for the Kirkwood water rights and snow-making projects.

Among other things, we prepared the Draft EIR and the Final EIR and findings for consideration by the Alpine County Planning Commission.

In conjunction with this work, we were responsible for coordinating with the various agencies responsible for resources affected by the project.

MS. LENNIHAN: Thank you.

Mr. Stubchaer, I would like to note that the only protests to the Kirkwood application and petition for partial assignment were filed by the El Dorado agencies. Those protests have now been withdrawn and, therefore, since neither the Department of Fish and Game nor any other resource agencies, nor any environmental groups or interests have filed protests, I would like to simply make Mr. Simpson available for cross-examination and ask him to state just a few sentences about the environmental review to expedite the hearing.

MR. STUBCHAER: Fine.

MS. LENNIHAN: Mr. Simpson.

A Well, in brief, we were responsible for preparation of an EIR under CEQA which also served as a NEPA document. The EIR was exhaustive. It was based on a worst-case scenario in every respect. It encompassed numerous alternatives. It considered cumulative impacts of all the identified potential water projects on the affected creek.

There were 100 mitigation measures identified in the EIR and every one of those mitigation measures was adopted by the Alpine County Planning Commission in their approval of the use permit for the project, and the EIR was certified in July of this year and the approval granted by Alpine County.

MS. LENNIHAN: Thank you.

The next witness is Diane Moore.

DIRECT EXAMINATION

by MS. LENNIHAN:

Q Ms. Moore, would you state your name for the record.

MS. MOORE: A My name is Diane Moore.

Q Is Exhibit KW 5 and the qualifications attached thereto as 5, a true and correct copy of your testimony and qualifications?

A Yes, it is.

Q Ms. Moore, would you briefly describe your role in evaluation of the snow-making project for which Kirkwood proposes to use water?

A I was responsible for the Biological Resources Analysis in the FEIR and that involved scoping and agency consultation, including a lot of consultation with the Forest Service; development of study plans; coordinating the data collection; identifying potential impacts resulting from construction and operation of the proposed project; analyzing these impacts and then for potentially significant impacts developing mitigation measures to reduce these impacts to a less than significant level.

Q As with Mr. Simpson, given that the only protest based on environmental grounds has been entirely withdrawn, I am going to ask Ms. Moore to summarize her testimony very briefly, and again, make her available for cross-examination.

Ms. Moore.

A The biological analysis in the EIR consisted of a resource inventory and an impact assessment, and then development of mitigation measures as necessary.

The resource inventory involved review of the existing information. A lot of this was provided by the Forest Service, and then field surveys. We did extensive botanical surveys searching for sensitive plants, inventoried trees within the proposed project area, and conducted surveys for sensitive wildlife species, Forest Service protocol surveys for species such as the great gray owl and northern goshawk.

In the impact assessment we looked at both construction impacts which we call footprinting impacts; that is, direct area where the project facilities would be put and quantified how many plants would be taken out, how many trees would be lost.

We also looked at operation impacts and this involved looking at changes in lake levels, increased amount of snow on ski trails and changes in flow patterns, and how those changes in the physical environment would affect biological resources. In all cases they were found to be less than significant, and in a few cases we had to bring them to the less-than-significant level with mitigation measures.

Overall from a biological perspective, it's a pretty good project. There are a few mechanisms for potential impacts and agencies with jurisdiction over the biological resources such as the Fish and Wildlife Service and Fish and Game were pretty complimentary about the EIR. Fish and Game, in their comment letter on the Draft EIR, concluded that the EIR is a well done comprehensive document.

MS. LENNIHAN: Thank you, Ms. Moore.

DIRECT EXAMINATION

by MS. LENNIHAN:

Q Mr. Wagner, would you please state your name for the

record.

MR. WAGNER: A Robert C. Wagner.

Q Mr. Wagner, will you describe what your role is, what you have done, briefly, with regard to the Kirkwood project?

A Yes. My main role in the project was to perform a hydrologic analysis in support of the applications before the Board on the Caples Creek watershed and Caples Lake.

Q Would you just briefly summarize your testimony for the record.

A Yes. I guess the best place for me to start, and I want to go through this fairly briefly -- there are probably five items I would like to discuss, the first being a brief project overview, and then I think we want to talk briefly about the consumptive-use aspects of the snow making, the return flow aspect of the snow-making project, the discussion about the study that we have done for Caples Lake, and then briefly about unappropriated water.

There are three water right applications before the Board. They are requesting a combined amount of about 500 acre-feet. Kirkwood requested a year-round diversion season under State-filed Application 5645, and at a minimum, I think, Kirkwood's need for the water rights project, a diversion season from November 1 to June 30.

As we have said, the project is to divert a maximum of 500 acre-feet to storage in Caples Lake, and then to be withdrawn from Caples Lake to either an offstream reservoir for reregulation to the snow-making system, or directly delivered to the snow-making system, and obviously, the purpose is to make snow on about 200 acres of ski trail.

The consumptive-use aspect of the snow making is interesting in that it is relatively small compared to other beneficial uses of water.

We estimate on the order of about six percent. Consumptive use of snow making is composed of primarily two components, watershed losses which consist of evaporation and sublimation, and what are generally characterized as initial losses which are losses that occur at the snow gun.

Now, the various reports that we have reviewed and those that are submitted with my testimony indicate to you that six percent for consumptive use for snow making, approximately five and a half percent for watershed losses being evaporation and sublimation, and approximately half a percent for initial losses is a fairly realistic value and might even be a tad bit conservative.

One of the comprehensive studies that was done that we submitted with the testimony was consumptive use of snow making in Santa Fe, and one of the conclusions was that on acre-foot per acre basis, the consumptive use of snow making was 0.053 acre-feet per acre.

Kirkwood proposes about 200 acres of snow making and that would convert to roughly 10 acre-feet, and if we consider on average that Kirkwood will divert 250 acre-feet per year, 6 percent of that is 15 acre-feet, so we think that the 6 percent is probably a pretty realistic value.

Return flows from snow making, because the consumptive use is so small, we will divert water in the winter, make snow with it, effectively store it on the hill

in the form of snow, it will melt in the spring with the snowmelt and return to Caples Lake watershed. And approximately 94 percent or 470 acre-feet of the 500, if we diverted a maximum of 500 every year.

In addition to the return flow in the snow-making operation, there is some element of streamflow increase that has likely occurred with Kirkwood's development. The phenomenon of streamflow increases as the result of trail clearing or logging, or vegetative clearing is well documented.

A report that I reviewed, and which is part of our testimony, by J. D. Cheng indicates that on the order of three to six inches of additional runoff might be expected over natural conditions, so if we look at Kirkwood's 200 acres, we might expect anywhere from 50 to 100 acre-feet of additional runoff due to trail clearing, notwithstanding the very small amount of consumptive use for snow making.

To kind of put all this in perspective, we undertook the task of trying to determine how Kirkwood's diversions would affect Caples Lake. When we were first presented with the project, my initial reaction was, why was anybody at all concerned about this, and the reason that occurred to me was snow making is such a small consumptive use that it didn't seem like we would have any impact at all on anybody.

Kirkwood, however, requested that we undertake a reasonably and actually a fairly exhaustive study of Caples Lake to determine if we would impact anybody, and who that would be and to what extent, and we have done that and that study is summarized in Tables 10, 11, 12 and 13.

We believe that the study confirmed our initial reaction that the impacts from Kirkwood's diversions will be very small, normally zero, and if there are any, they would clearly be characterized as de minimis.

I guess to kind of summarize and kind of talk about unappropriated water in relation to the analysis that I did, I will try to put that in perspective here a little bit.

The inflow to Caples Lake on an average annual basis is about 29,000 acre-feet. Kirkwood proposes to divert a maximum of 500 and of that we would expect consumptive use of about 30, and that would be if we diverted 500 every year, which we don't expect to do, so if we look at nothing other than the Caples Lake hydrology, we are talking about 30 acre-feet as opposed to 29,000, and I really feel the need to emphasize that because there's such a dramatic disparity between those two numbers.

Anyway, that notwithstanding, the analysis that we did on the Caples Lake was predicated on a maximum diversion of 500 acre-feet every year, and what we found was that the lake would spill in 70 percent of the years. Historically it's spilled in roughly 71 percent of 72 of the years.

In the non-spill years our study required that there was no change in the published releases from Caples Lake and when we were done we still concluded that there were no impacts, and I think it is fairly clear that Kirkwood can divert 500 acre-feet every year, which it is unlikely to do, and not have an impact on Caples Lake or downstream users.

Q Mr. Wagner, you testified that the study that you did

is contained in the tables which are attached to KW 6-B to your testimony. Is it true that Table 11 is what you call Case 2 or 500 acre-feet?

A Yes, we refer to it as Case 2.

Q And Case 3 assumes that Kirkwood would divert on average 250 acre-feet per year?

A Yes, that is correct.

Q And which is the more realistic presentation?

A I would say that the 250 acre-foot analysis more realistically represents what Kirkwood is likely to do, and the associated impacts.

I would like to point out, however, that although that's a more realistic representation of what Kirkwood is likely to do, in either case we found the impacts were zero or de minimis.

Q You also referenced the offstream reservoir which was the subject of the earlier testimony. Is that offstream reservoir proposed to be used for storage as well as reregulation?

A Yes, I believe it is.

MS. LENNIHAN: Thank you.

MR. STUBCHAER: How many parties wish to cross-examine this panel?

Mr. Turner, staff, Mr. Moss. All right.

MS. LENNIHAN: Just an important housekeeping item. I forgot to ask Mr. Wagner, is KW 6, 6-a and the other exhibits attached as part of KW 6, true and correct copies of your testimony and qualifications?

MR. WAGNER: Yes, they are.

MS. LENNIHAN: Thank you.

MR. STUBCHAER: All right, we will take a 12-minute break.

MR. VOLKER: Mr. Stubchaer, I wanted to provide everyone as soon as we have produced them the two rebuttal exhibits that we intend to present today. These were generated this morning and I will distribute them now so everyone will have them.

MR. STUBCHAER: All right. We are in recess.

(Recess)

MR. STUBCHAER: The hearing will please reconvene.

Ms. Lennihan, is your panel ready for cross-examination?

MS. LENNIHAN: They are. Thank you.

MR. STUBCHAER: Mr. Moss.

CROSS-EXAMINATION

by MR. MOSS:

Q Good morning. Mr. Wagner, are you the person who decided that whatever the losses might be to downstream owners of this application that they were to be characterized as de minimis?

MR. WAGNER: A Did I decide that?

Q Did you suggest it?

A No.

Q So, as far as you are aware, Ms. Lennihan's characterization of it as de minimis is not supported by your research?

A No, I wouldn't say that either. I think that the

impacts to downstream users, if there are any, are so incredibly small as to defy quantification. In most of the years in the data that I looked at, there are no impacts to users downstream.

Q Now, would you agree with the statement, though, that the loss of 500 acre-feet to downstream users is not de minimis.?

A I don't know whether I would agree with that or not. I suppose I would ask in what context.

Q Well, in the context of their exercising their potentially senior water rights.

A With respect to Kirkwood's project, there wouldn't be a loss of 500 acre-feet downstream to holders of prior rights.

Q Well, if hypothetically that would occur, you would agree it is not de minimis?

A In the context of the South Fork and the hydrology of the South Fork and the users that I am aware of, of the waters of the South Fork, I am not sure I would agree with that.

The Board wrote in Decision 1587, I think, that there was 60,000 acre-feet of unappropriated water and there's a comment in that decision that 33,000 acre-feet is a relatively insignificant amount of the total contribution of the flow of the South Fork.

So, hypothetically, I guess to put your question in perspective, if 33,000 acre-feet is an insignificant amount of the annual flow of the South Fork, which I think is on the order of 1.1 million, 500 acre-feet would clearly be an insignificant amount.

Q But isn't that a matter of timing? I mean, there are obviously high flows in this river, but there are other times when there are not those high flows where 500 acre-feet would, in fact, be seen and would result in a loss.

A Hypothetically, I suppose that could happen on the South Fork.

Q Now, in your study of Caples Lake, did you determine that at any time in the winter months there was available storage for the water that is sought by this application or room for additional storage?

A Can you repeat that one more time?

Q Well, in terms of the filling and spilling, or whatever happened to the hydrology of Caples Lake, was there on average a whole there for 500 new acre-feet to be appropriated?

A The hydrology of Caples Lake, based on the assumption that Kirkwood diverts 500 acre-feet every year, which is a very conservative assumption, we found that the lake would spill in 70 percent of the years. In the non-spill years, the analysis that we did assumed that whatever the published releases were in that year or month, or whatever, that those releases would be maintained whole, meaning that the operations of the lake would have released the same amount of water that they did whether Kirkwood was there or not.

The significance of that is that in 95 percent of the years, I think, there was sufficient water remaining in storage to accommodate Kirkwood and not disrupt that

hydrologic balance that developed or fell out of the 58 years of record that we looked at.

So, with that in mind, I would say the answer to your question is yes.

Q Are you seeking water by direct diversion of surplus water; is that the case?

A No, Kirkwood seeks water by direct diversion and operationally there are times when the change in storage in Caples Lake and the inflow to Caples Lake is such that there is water available for diversion to snow making by direct diversion, but Kirkwood's application also seeks storage, as you know, and I think that the hydrologic record is such that there is water that Kirkwood can divert to its snow-making seasons from storage in Caples Lake.

Q Well, again, not to belabor the point, it's PG&E's position that it is the licensed owner of all storage in Caples Lake and that you are, in essence, seeking to store water in a reservoir that has no additional capacity.

Would you agree with that?

MS. LENNIHAN: Objection. That asks for a legal conclusion.

MR. STUBCHAER: I will permit the answer to the extent you can answer. An expert in hydrology has some knowledge.

A Notwithstanding legal implications as to whose rights are senior or otherwise, or whatever legal arguments there may be, that Kirkwood might obtain a senior position against those rights, I think hydrologically the record is such that there is sufficient unused, let's call them foregone releases, in Caples Lake on an annual basis to accommodate Kirkwood's diversions.

MR. MOSS: Q Moving on, would it seem to you that Kirkwood is much more likely to divert the maximum or closer to the maximum in those years that could be characterized as dry years or critically dry years? Basically they want the water; don't they, when there isn't snow, not when there is a lot of water flowing around everywhere?

A That's kind of an interesting question because Kirkwood wants to make snow before we know whether it is a critically dry year or not. We won't know that until the spring and the timing of precipitation is far more important to Kirkwood in regard to its demand for snow making than the total amount of precipitation in any given year.

Q So, that it's a potential, though, depending on that unknown, that the impact could, in fact, be significant because we might well be dealing with years where there isn't spill?

MS. LENNIHAN: Objection. Can you describe in your question what you mean by significant? I am not sure what you mean.

MR. MOSS: I attempted to elicit from the witness the general understanding that a loss of 500 acre-feet was of some significance to a downstream water-right holder, so I mean, if you accept that as a hypothetical, I would ask whether in dry years, if, in fact, that amount could be lost.

MR. STUBCHAER: In your question I wasn't clear whether you were talking about the consumptive-use loss of the amount of diversion as a loss to the downstream water-right holder.

MR. MOSS: Mr. Stubchaer, I am going to have a few questions relating to consumptive use. At this point, I am assuming that if the water is, in fact, diverted it is a loss and I will try to --

MR. STUBCHAER: That is a hypothetical so the witness is supposed to answer in that context.

MR. MOSS: Q Yes, assuming that the water diverted does not return either in time or it cannot be diverted -- as an example, since Caples Creek flows in below the dam, it may not be captured in the dam, it may come at a time when the diversion is fully taken by natural flow and the water is not available. I mean, I think there are a number of hypotheticals here that you could envision in which the water would, in fact, be lost.

MS. LENNIHAN: I would like to object because there is apparently an assumption of facts that aren't in the record at this point. Perhaps you could rephrase your question to get the response you are interested in without assuming those facts, and also, your earlier comments characterized testimony in a way that isn't accurate, so we will let the record stand on that response.

MR. STUBCHAER: Could you rephrase your question?

MR. MOSS: Q Is it not true that, in fact, when the man-made snow melts, assuming that it flows into Caples Creek, that it bypasses storage in Caples Lake?

A The snowmelt returns below Caples Lake Dam, that is correct.

Q And in your studies, have you looked at the question of whether at the time it returns the diversion to El Dorado Canal of approximately 156 second-feet -- is that available to capture that water, or is it likely to spill past the El Dorado diversion?

A The answer to your question really comes in two parts. The first part of the answer is yes, during the times, and I won't say all of them, but most of the time that water returns to Caples Creek, water would likely spill past the El Dorado diversion dam.

The other side of that answer, however, is that the volume of inflow to Caples Lake is so great even in low-flow years, that it replaces the diversions, or what is called the withdrawals from storage the previous winter for snow making in the amount, whatever Kirkwood takes out, and my assumption is 500 acre-feet every year. And regardless of whether Caples Lake spills or not, that water still returns to Caples Lake in the form of inflow to the lake, and 470 acre-feet of those withdrawals from the previous winter return to Caples Creek in the form of snowmelt, so the actual change is 30 acre-feet.

MR. MOSS: Thank you.

MR. STUBCHAER: Mr. Turner.

MR. TURNER: Thank you, Mr. Stubchaer.

CROSS-EXAMINATION

by MR. TURNER:

Q Mr. Wagner, are you familiar with the settlement agreement that has apparently recently been entered into with El Dorado County Water Agency and El Dorado Irrigation District in connection with your Kirkwood Associates applications for the permit to divert this 500 acre-feet from Caples?

MR. WAGNER: A I am aware that there had been negotiations. I am not aware of the details of those settlements.

Q Now, Ms. Lennihan stated in her opening statement that there had been, maybe it was Ms. Tirschman, but it was stated earlier that one of the elements of the settlement was there was a commitment by El Dorado County Water Agency and El Dorado Irrigation District to assure or to reserve, let's say, 500 acre-feet of water in Caples Lake for diversion by Kirkwood Associates.

Now, have you or do you know if anybody else for Kirkwood Associates has analyzed how that change in operation would impact the quantities of water that will be flowing downstream for the operation of Caples Lake itself?

A I would not expect there to be any change in my analysis. My conclusion in, say, knowing now that there is a recognition that Kirkwood might take up to 500 acre-feet from Caples Lake for snow making and that the operator of Caples Lake would recognize that they might do this, and the reason I say that is the study that I did was done without regard to such reservation or without regard to that recognition.

In other words, I looked at the hydrologic records and assumed Kirkwood would take 500 every year and then drew the conclusions that I have testified to that there wouldn't be a change in the flow regime below Caples Dam that will have any effect on prior right holders.

Q Let me see if I understand that. Are you telling me even without a commitment to reserve the water in storage in Caples Lake for Kirkwood Associates, that if Kirkwood does, in fact, divert 500 acre-feet from Caples Lake every year, that that is not going to in any way affect or modify the normal operation of Caples Lake?

A On an average annual basis, in a normal sense, no, it should not.

Q You had stated earlier, I believe, in response to one of Mr. Moss's questions and I have a note where you said in 97 percent of the years that sufficient storage remained in Caples to cover the 500 acre-feet that would be diverted by Kirkwood Associates; is that correct?

A No, 95 percent of the years.

Q Ninety-five percent of the years?

A Yes. It might be 97. I would suspect 95.

Q In that remaining percentage, the 3 percent or the 5 percent, in those years, would there, in fact, be a reduction in the amount of storage in Caples Lake resulting from the 500 acre-foot diversion?

A No, that would include the 500 acre-foot diversion having already been made.

Q And in the other 95 percent of the years, there would have been what, more in storage?

A Yes. Whatever management scheme or criterion was used to operate Caples Lake since its inception, assuming that it exists now, has accounted for all the demands that existed at the time that the management criteria was in place. The reason that I think we can make that conclusion is because of the extremely large volume of inflow that Caples Lake receives on an annual basis. They receive 55 inches of precipitation annually, which is something on the order of 400 inches of snow. Even in low-flow years, the inflow to Caples Lake is relatively high and I mean relatively high compared to what Kirkwood proposes to do, and whatever the downstream demands are on water from Caples Lake.

So, in operating the reservoir from year to year, there is generally sufficient carryover storage, or what I characterize as foregone releases to account for whatever Kirkwood might have done had they existed since 1935, or beginning next year or the year after, or whenever.

MR. TURNER: I would have no further questions.

MR. STUBCHAER: Staff.

E X A M I N A T I O N

by MR. LAVENDA:

Q What is the normal outflow from Kirkwood Meadows contribution from the runoff? Is that quantified? Has it been measured? Did you run across this, Mr. Wagner, in your hydrologic evaluation? Do you know the quantity of runoff from that basin under current conditions?

MR. WAGNER: A The annual average discharge from Caples Lake outlet near Kirkwood is approximately 28,000, or more than 28,000 acre-feet per year. That number is published.

I am not aware -- maybe -- I don't know, maybe I'm not answering your question. Maybe I don't know the answer either.

Q What I am seeking here is do you have some estimate of the amount of snowmelt that is contributed from Kirkwood Meadows and its environs -- won't call it a valley, it's a basin that drains out of that area that is a contribution to the American River drainage?

A The drainage area of Caples Lake, of course, a large percentage of --

Q I am not saying Caples, Kirkwood valley, Kirkwood Meadows.

A Kirkwood Meadows, I don't know, Mr. Lavenda.

Q Would you classify the snow making since you are claiming that roughly 70 percent, I believe, or 80 percent of the snow returns to the system, would you classify snow making as an alternate method of storage, albeit unregulated?

MS. LENNIHAN: I just want to note that is a very interesting question. There are some legal issues that are imbedded in that and this witness was not qualified to give a legal conclusion.

With that caveat, I would expect Mr. Stubchaer's desire that witnesses respond, it goes to the weight of their answer.

MR. STUBCHAER: With that caveat, I will let him

respond.

A I was going to respond the way Ms. Lenniham did, that is a very interesting observation, and I believe I even characterized it that way, although more perspective than anything else. In a sense, you withdraw water from a high mountain lake and freeze it, and you get it back in the spring when the snow melts, and whether you have left it in the lake and got it back or got it back from the mountain, I don't know.

In a physical reality, I guess that happens.

Q Let me rephrase it a little bit differently. In the event that there was enough precipitation after the fact that Kirkwood were to withdraw the 500 acre-feet and generate snow on the mountain such that Caples would spill on refill, now you have an additional amount stored on the hill in Kirkwood, of which 90 percent would be returned to the watershed.

Can this be classified, or in your opinion, would this be classified as an alternate method of storage?

MS. LENNIHAN: Same objection.

MR. STUBCHAER: Same ruling. I think that's kind of an answer.

A Mr. Lavenda, the comment I was going to make is we estimated 94 percent as opposed to 90 percent, and you are right, there is some yield augmentation as a result of the nature of the project. I don't know if I can characterize it that way, the way you have.

Q What I was striving for was in the event that a downstream user might be considered deprived, or impacted by the diversion from Caples. In essence, it strikes me that perhaps water is being made available, although uncontrolled, is being made available from an alternate source in the same watershed to augment downstream supplies, especially those that will later be impounded, that have the capability to impound flows that may have been foregone in the previous season.

That was the reason for my question.

If you have any comment in that regard, feel free to respond.

A I don't, really. I suppose there is some watershed yield augmentation. I don't really know.

One comment that I might make is that I probably shouldn't comment.

Q Okay. Since the project proposes taking water out of the lake and making snow, and snow normally wouldn't occur because there is no precipitation in the basin, in the event that you should generate snow early and you get a warm spell, have you considered any impact due to sudden flooding earlier in the season that might occur in that meadow? Did your evaluation or the environmental document consider this aspect?

A Mr. Simpson might be a person more qualified to answer that question. And before I turn the microphone over, you know, my sense is no, that wouldn't be, and I say that more out of experience in mountain environments and with, you know, just general relative amounts of snowfall that occur in the Sierra rather than from my study.

I would think that there shouldn't be any impacts. I mean, it snows and it rains, and the snow melts and you know whether we make snow or not isn't going to have any impact on that at all.

Q So, your opinion is that a concentrated location of man-made snow in a confined basin such as Kirkwood would not present any type of potential flooding of its environs in the event you got a warm spell immediately following snow making?

A I would think not.

MR. LAVENDA: Thank you.

E X A M I N A T I O N

by MR. TAYLOR:

Q Mr. Wagner, I think you testified that it's part of the process of clearing the lanes for skiing on the slopes that additional runoff in the spring was a result of that operation; is that correct?

MR. WAGNER: A Yes.

Q Is additional land clearing anticipated as a result of installing your snow-making pipelines and so forth?

A I believe there are, and again, I might defer to Mr. Simpson. I believe there are plans for future development and trail clearing at Kirkwood.

Q Can someone answer that?

MR. SIMPSON: A To my knowledge, Kirkwood has plans to expand the ski trail system in the future by many tens of acres.

Q Many tens, can you be more specific?

A I may be able to. I don't have that data with me. Perhaps some of the other witnesses from Kirkwood can speak to this.

Q One other question. I would like to deal with the scenario where Caples Lake has been reduced to the lowest level in the fall of the year such that, say, PG&E would not anticipate additional releases from the lake.

Under those circumstances, is it Kirkwood's intention then to draw those lakes down some additional amount before you really begin to have any significant inflow to the lake from fall and winter storms?

MR. WAGNER: A I am not sure I follow your question.

Q There has been a great deal of concern by residents in the area of Caples Lake that the lakes be drawn down too low.

My question is, is your intention to pull the lakes down still farther when the lakes are at their lowest extreme? Perhaps I should ask how far would you anticipate that the lake level would be drawn in response to that?

A I think the concern over lake levels has largely been related to recreation opportunities in the summer.

The maximum surface area of Caples Lake is close to 8,000 acre-feet. In the wintertime, it is generally frozen. Kirkwood's withdrawals would take place, obviously, in the winter for snow making; and the recreational opportunities at Caples Lake -- I won't say they are nonexistent because there certainly could be some, but they are certainly curtailed.

The study that we did indicated that the maximum

water surface change in the summertime was well within the limits that were indicated in Kirkwood's EIR, and so, you know, we wouldn't expect any impacts as a result of Kirkwood's diversion on lake levels.

Q Let's try it a different way. Assume that there are no natural inflows in November and December to the lake. The upstream tributaries are dry, and Kirkwood Associates pumps 500 acre-feet in November or December, how much would the lake level fall if the lake was already at its minimum pool in a physical sense?

A When Kirkwood begins to withdraw water in November and December, the lake levels are relatively high. They normally reach their low point in the wintertime, in late winter, and I didn't evaluate that. Again, the significance of the impact would have to be considered in recognition of the lake being frozen, and I know that you are looking for a number and I don't have one for you.

MR. TAYLOR: Thank you.

MR. STUBCHAER: I had a question on the consumptive use in the snow making. Have you seen anything in the literature that indicates a higher rate of consumptive use from evaporation, sublimation and things like that?

MR. WAGNER: A Yes, there is a range in studies that were done in Colorado and New Mexico that indicated that slightly higher -- it's kind of interesting, Mr. Stubchaer, because even if you take the highest, and I don't remember what it was, if you take the highest rate I encountered, it still makes Kirkwood's total consumptive use incredibly small.

The higher numbers of the study done in Colorado and New Mexico were done in different climatological environments at higher elevations under different conditions that exist in the Sierra, and the number of watershed losses, evaporation and sublimation that we found appropriate, was based on conclusions and studies done in the Sierra.

MR. STUBCHAER: I recall hearing many years ago a study by the Los Angeles Department of Water and Power about the losses from evaporation in Owens basin. Of course, there you had a lot of snow on the chaparral and the sagebrush. A lot of that snow never reached the ground. That is a different situation than where you have cleared ski trails. Those numbers are much higher for losses.

A I would think so, and it's a little dry over there, too, I think.

MR. STUBCHAER: What are the highest values of consumptive use you found in the literature not in the Sierra?

A I don't recall offhand. Sixteen percent, I think, was the highest value that I saw for all uses, and that number was part of a series of studies that were done and there was a whole range, in fact, some of those studies show a gain which statistically, I suppose, is an aberration. You wouldn't expect to have a gain from consumptive use of any kind of water, but I think 16 percent.

MR. STUBCHAER: Okay, thank you.

Ms. Lennihan, do you have any redirect?

MS. LENNIHAN: I do, just briefly, to make sure we have adequately answered the staff's questions.

REDIRECT EXAMINATION

by MS. LENNIHAN:

Q What I would like to do is call Penny Tirschman just for a moment, because she's actually the right person to respond to the questions regarding ski trail expansion.

I believe that the staff were inquiring as to whether or not the snow making was going to be on existing trails or new trails. Which is correct?

MS. TIRSCHMAN: A It will be on existing trails that are presently cleared and used for skiing.

Q Does Kirkwood have plans to clear these trails?

A We do have a mountain master plan that is with the Forest Service that does show a few trail expansions. All that work is done in accordance with NEPA standards as required by the Forest Service.

MS. LENNIHAN: Thank you.

MR. STUBCHAER: Any recross?

MR. LAVENDA: I just wanted to clarify, are the road lines shown on that large map, the existing trails?

A Yes.

MR. STUBCHAER: Thank you.

Ms. Lennihan.

MS. LENNIHAN: Q Mr. Wagner, in your testimony, which is contained in Exhibit 6, KW 6, is there a section which addresses lake levels?

MR. WAGNER: A Yes, there is.

Q And did you evaluate based on historic records what would be the maximum impact to the lake levels?

A Yes, I did.

Q Thank you.

Mr. Simpson, can you respond to the question -- I don't know whether you can, and let us know if you don't know, but there was a question directed to Mr. Wagner regarding the volume of runoff from the Kirkwood Creek, the Kirkwood Meadows watershed.

Do you know the answer to that question?

MR. SIMPSON: A Yes.

Q What is it?

A The answer was provided in a study of the Kirkwood basin hydrology in the 1960s by Culp, Wesner and Culp, and they projected the total runoff in Kirkwood basin of approximately 5600 acre-feet per year on the average.

MS. LENNIHAN: Thank you.

MR. STUBCHAER: I'm sorry that I interrupted your redirect.

Any recross of these witnesses? All right.

MS. LENNIHAN: Thank you. Kirkwood Associates has one final panel of witnesses to call, and I would like to do that now, so I will ask Cameron Craik, Doranna Glettig, John Voss, Richard Alpaugh and Lucy Brown Reese to come to the witness table.

First of all, I just want to ask the panel whether everyone has taken the pledge today? We have one witness who has not.

(Thereupon the pledge was administered to the

witness.)

DIRECT EXAMINATION

by MS. LENNIHAN:

Q I am going to go in the order in which the testimony is presented in our binders.

Mr. Craik, will you state your name for the record.

MR. CRAIK: A My name is Cameron Craik.

Q Is Exhibit KW 7 a true and correct copy of your testimony?

A Yes, it is.

Q Can you tell us what your role is with Alpine County?

A I am on the Board of Supervisors and currently serving as Chairman.

Q Would you please summarize your testimony regarding the Kirkwood snow-making water rights application?

A Yes. Basically, I have lived in Alpine County for 22 years as my testimony states. I am fairly generally familiar with the snow-making project that Kirkwood is proposing. I think that the Board of Supervisors has taken the position that snow making is essential for Kirkwood to survive.

Over the years we have seen tremendous fluctuations in the amount of time that they are open. They need the snow making to have a stable base, as Ms. Glettig will testify to the actual percentages of taxes -- they put an awful lot of tax dollars into Alpine County, which is a very small county. We have 1200 residents.

If we lose Kirkwood, it would have a very severe impact on our county government.

Alpine County has been involved from the beginning in land use at Kirkwood. We continue to be involved, and Kirkwood has been a good partner to us.

Q Can you tell us if it is the County's position that Caples Creek water should be used in the county?

A Yes, it is. We are the county of origin and we do feel that the water should be used in Alpine County first, and then can go on to downstream users.

Q Thank you.

Ms. Glettig, would you please state your name for the record.

MS. GLETTIG: A My name is Doranna Glettig.

Q Can you tell us whether Exhibit KW 8 and the attachments thereto are true and correct copies of your testimony and qualifications?

A Yes, they are.

Q Would you please summarize your testimony.

A Well, Alpine County is the State's smallest county and the Federal Government owns 90 percent of our county, which just leaves 8 percent available for our tax base and our prosperity.

Kirkwood ski resort contributes 20 percent of the property taxes collected in Alpine County.

In my written summary also there is a typographical error where it states that figure is 10 percent, and it should be corrected to 20 percent.

Exhibit 8-B indicates the amount of taxes collected and the amount of taxes Kirkwood paid for years '88-89

through '94-95.

Kirkwood also contributes 39 percent of a transient occupancy tax, and Exhibit 8-D shows the figures there for years '88-89 through '94-95.

I would have to add that Kirkwood is an important and vital contributor to Alpine County's prosperity and we need Kirkwood.

Q Thank you, Ms. Glettig.

Mr. Alpaugh, will you state your name for the record.

MR. ALPAUGH: A My name is Richard Alpaugh.

Q Mr. Alpaugh, is Exhibit KW 9 a true and correct copy of your testimony?

A Yes, it is.

Q Would you please summarize your testimony.

A Yes, I will.

The reason I am here is basically to let you know about a lot of small businesses that are located in Kirkwood valley. We happen to be an eight-story condominium building and my company controls 12 of the condominium units, so compared to Kirkwood, we are a little guppy in the entire place up there, but Kirkwood is very very important to us.

In fact, we are 100 percent dependent upon their operation. In fact, if Kirkwood does not operate during a period, we don't operate and we don't have the cash reserves that they have to survive down years. If we lose a period of time to no skiers, it affects us greatly and personally since this is how we make our money and our income.

So, we, obviously, are interested in seeing snow making up there so that it will assure that we have the skiers which basically we cater to for business.

It also impacts us in the summer business in that most of our guests that come back to visit us in the summer have been skiers during the winter. Because of the lack of opportunity to advertise on the corridor up there, we rely upon past guests to also bring our summer business.

Thank you.

MS. LENNIHAN: Mr. Voss, would you state your name for the record.

MR. VOSS: A My name is John Voss.

Q Can you tell me whether Exhibit KW 11 is a true and correct copy of your testimony?

A It is.

Q Can you summarize that for the participants?

A How long do I have? Do I have a couple of minutes?

MR. STUBCHAER: You have up to 15 minutes but it is only two pages.

A Well, there were some critical things that weren't said. Yes, I was writing it, so I would like to interject those.

Caples Lake Resort was conceived in the late thirties by Ray Koenig from Carson City and he operated until the early fifties and another family, the Arosa's bought it and they sold it to the Berglund family in 1965, and the Berglunds operated it as a summer resort also, and when Kirkwood was going to open up in the winter of '72, they tried to winterize the resort in the summer of '71. They

tried to underground the water lines and they tried a well, and they put in new generators because we are a self-contained city.

Kirkwood opened, I think at Thanksgiving that year, and in February the Berglunds closed up Caples Lake Resort. Berglund then sold the resort in the summer of '76 to the Kinser family from Modesto. '76-77 was a dry year, the lake was down probably 30 feet. The docks were out about 100 to 200 feet out of the lake. The Kinsers tried to operate the resort in the winter of '77-78. They finally gave it up because there wasn't enough business.

All the pipes froze, the well went south and they had to pump out of the lake, et cetera, et cetera, et cetera.

Well, you know, I came along in 1982, a dumb flatlander, and I said, this looks like a nice place to work, so I bought Caples Lake Resort with my family, intending to run it and live up there.

Well, over the winter of '82-83, a hundred-year storm sent me back to the Bay Area to my old job, and finally, this December I retired after my family ran the resort for 12 years.

In the winter of '91, after about five years of drought, we had to close the winter operation. We did run the resort year around from '82 to '90, but the winter of '91 we had to close because it was about ready to break me and almost broke Kirkwood, but they thankfully declined and dug deep into their pockets.

I'm very aware of how Kirkwood is vital to our winter business. It is probably 75 percent of my business.

As far as their effect on the summer business, if you look at Exhibit KW 6-L, the lake levels, PG&E, and if you look at page 12, I think this was the question you were trying to ask, Mr. Taylor, to get a simple answer to.

When I left this morning, the gage level was 52 feet. The maximum on page 13 is 62 feet. So, Kirkwood -- and if you look at page 11 and you look at the gage height at 52 feet, the volume of the lake is 15,750 acre-feet. And if you go down to 15,250 acre-feet, that's at 51.2 feet, so if Kirkwood withdrew all their 500 acre-feet out today, it would go down a foot, big deal to the business right on the lake and to the residents, and later in the year it would go down approximately the same, maybe a foot and a half, two feet.

Okay, that's it.

MS. LENNIHAN: Thank you.

Q Ms. Lucy Brown-Reese, would you please state your name for the record.

MS. BROWN-REESE: My name is Lucy Brown-Reese.

Q Can you tell us whether Exhibit KW 14 is a true and correct copy of your testimony?

A Yes, it is.

Q And would you please summarize that briefly for the participants?

A Well, I understand I have 15 minutes but I will try to be as brief as Mr. Voss was.

I am sitting here and I am getting emotional, and my testimony covers mainly the year '90-91, which was a very

difficult time. My son had been in a very bad auto accident the end of May, the last day of May, and was in a coma for some time.

And I hired for the first year a business manager and paid him a considerable amount to put together my business affairs while I needed to be away a lot of the time, a great deal of the time with my son's life-and-death circumstances which went on for about two years.

He came out and very aptly put together a business for me and I started on December 20. He was a little optimistic, however, and he ran up huge start-up costs, in the thousands, having come from a large ongoing year-round business.

Also, we had a very full staff, and I operated for ten days, December 20 to December 31. I would like to qualify that. It says in my testimony my business closed. After December 31, this manager who was trying so hard to help me, would open the business and I would have receipts of \$100, perhaps as much as \$150, not even enough to cover my start-up costs.

They were wonderful people that I hired who had been so happy to get the job and had given notice in town, and they had to go on unemployment. My receipts did not begin again until the miracle March in which it came and the skies fell in, and I was unable to really operate a business in blizzards until the last part of March, and then, I again had to lay off people. It was very difficult for them because they had to come from town. I draw from the town pool because I am not able to supply housing for them as well as Kirkwood does.

I used to look over at the lodge and think, how can they do it because their numbers are so much higher than mine. But they have never been able to complain and I was able to.

So, that, in summary, is what happened. My receipts were 25 percent of my gross. That year I had six weeks of business.

Kirkwood is intending to have people from the outside community come in who are going to be in the same situation I am, perhaps not in a crisis situation, but that will be drawing from the community, and the people who are working who have to give a reasonable notice to their bosses and then the jobs end there. And I never know when I am really able to hire. I am at the mercy of the elements, as all of us are right now.

Thank you.

MS. LENNIHAN: Thank you, Ms. Brown-Reese.

MR. STUBCHAER: Thank you.

MS. LENNIHAN: We have one other witness who is not available until this afternoon. However, given the stipulation that was entered into yesterday -- first, I would like to offer these folks for cross-examination if anyone wants to do so.

MR. STUBCHAER: Anyone wish to cross-examine this panel?

I see none.

MS. LENNIHAN: Thank you.

MR. STUBCHAER: Staff. Okay.

MS. LENNIHAN: In that event, what I would like to do is move into evidence the Kirkwood exhibits. I would like to, again, note that the only exhibit which we will not be moving into evidence is KW 8-C. The remainder is KW 1 through KW 17, and all of the attachments to that testimony.

MR. STUBCHAER: Any objection to receiving those in evidence? Hearing none, they are accepted.

MS. LENNIHAN: Thank you.

MR. STUBCHAER: Thank you all for coming.

Mr. Supervisor, I can't help but think you have one supervisor for every 246 residents and I look at Los Angeles where you have one for every two million. You have a more representative government.

MR. CRAIK: We know all our constituents.

MR. STUBCHAER: That's good.

Okay, Mr. Somach, you will be next on your protest of competing applications. I think we will do that after lunch.

MR. SOMACH: That's fine.

MR. STUBCHAER: All right. Mr. Taylor, any comments before we take our lunch break?

MR. TAYLOR: No.

MR. STUBCHAER: We will take our lunch break and reconvene at one p.m.

(Noon recess)

TUESDAY, OCTOBER 31, 1995, 1:00 P.M.

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MR. STUBCHAER: Good afternoon. We will reconvene the hearing.

Next will be the direct testimony of El Dorado Irrigation District and El Dorado County Water Agency in protest to competing applications.

Mr. Somach.

MR. SOMACH: Yes, Mr. Stubchaer, if I could perhaps suggest a little bit different way of proceeding in terms of order, we are concerned about making sure that these proceedings end today, and if we could move our order to the very end, we may, based upon the time, decide to act differently than we would if we proceed now.

So, if I could request that we pass and then be

allowed to put on our -- I am not sure we will put on testimony, but we be allowed to do what we are going to do at the end.

MR. STUBCHAER: As you decide later. Fine.

Pacific Gas & Electric Company, Mr. Moss.

MR. MOSS: Good afternoon, Mr. Stubchaer.

I am Richard Moss appearing for Pacific Gas & Electric Company.

PG&E protested basically the group of subject applications based on the fact that these all basically at one point in time or another propose taking water that PG&E has both a prior vested right recognized under State law, some of which historically went back to 1860, and proposed to put it to a new use.

And secondly, because many of the applications required for their fulfillment impacts on our FERC license Project 184, the El Dorado project.

Now, to give you kind of a summary of where we are with those protests, PG&E's protest of Kirkwood Associates, basically PG&E is very close to agreement with that applicant on terms that will satisfy us and will resolve our protest, and we anticipate, we are pretty sure that by the end of the time period you provided for this immediate hearing, that that settlement will take place and our protest to Kirkwood's application will be dropped.

Now, as far as the El Dorado Irrigation District application, I can only comment that as they are now revised, they appear to pose little risk of injury to Pacific Gas & Electric Company and its project, that it is simply proposing to take water out of Folsom, water that's already completely passed through our project and which PG&E basically doesn't have any further claim on.

As to all other applicants, our protest basically stems and that is we have not reached agreement with any of these in terms of dismissing those protests.

Now, this actually, though, leads me to a discussion of what PG&E believes is a significant mistake of law in this hearing, and that is the Board's -- what I would characterize as a misadventure in attempting to regulate a condition in the operation of their FERC license. And, to us, we feel that the law is very clear and going back, of course, the first allocation in the 1940s and now much more recently the Board's case involving Raw Creek, the U. S. Supreme Court held that the Board's sole authority over rights for a FERC-licensed project is to address, if necessary, the question of whether the licensee has the necessary rights under State law to operate the project.

That's where it begins and ends. It doesn't extend toward the operation of the project or its reservoirs or anything of the kind. Basically, there is no legal authority that gives the Board authority to reoperate PG&E's reservoirs as is being proposed by many of the witnesses and applicants to this hearing.

In our mind, the hearing has crossed a line, which unfortunately as we have seen, leads to a kind of slippery slope because there is no better example of the folly of this course as the testimony of many of the witnesses in the

proceeding that have urged the Board to condition the operation of Silver, Caples, Echo and Aloha Lakes on various conditions, including the mythical PG&E historic operation pattern.

We can discuss that in the testimony of our witnesses, but this is exactly what the courts have held, that the Congress has pre-empted and given to FERC, and it may be, you know, of interest to the Board all these questions of operation, but I just urge the Board to understand that this is a path that they have already gone down and it leads to a very clear holding by the highest court, and I think it's a mistake to revisit that at this point.

So, saying that, I will introduce our one and only witness, who is a return witness to this proceeding, Frank Lynch.

MR. STUBCHAER: Did you take the pledge?

MR. LYNCH: Yes, I did.

DIRECT EXAMINATION

by MR. MOSS:

Q Mr. Lynch, would you state your name for the record, please.

MR. LYNCH: A My name is Frank Lynch.

Q And did you testify previously in the Board's 1993 hearing relating to the El Dorado application?

A Yes, a copy of that testimony is attached to my present testimony.

MR. MOSS: And I might add that I have additional copies of both testimonies if anybody here would like to have that.

Q And your qualifications and related work experience and duties generally are still as stated in that document which we previously filed as your Statement of Qualifications?

A Yes, they are, except my service with PG&E now extends closer to 30 years.

Q Is there any part of your 1993 testimony that you would now like to revise?

A Yes, I would like to update and expand my previous testimony. This would include the current status of the El Dorado project and any additional information on PG&E's customer operation that relates to the storage reservoirs.

Q And what is the first change you would like to discuss?

A In my answer to question No. 2 in my previous testimony under the heading of Powerhouse, I would like to add that the El Dorado powerhouse has not operated since a nozzle-body failure that occurred March 5, 1993. As discussed below, PG&E chose not to repair the powerhouse, but to seek a buyer for the El Dorado project.

Q And has this occurrence altered PG&E's operation of the upstream water storage reservoirs?

A It has not altered it substantially, although clearly we are holding more water upstream in storage a little longer than we historically would have, since this benefits recreation and the water cannot be put to use in the El Dorado powerhouse.

Q Has PG&E abandoned any of the water rights for the El Dorado project?

A No, the water rights are part of our FERC-licensed El Dorado project and they will be transferred with the other assets of the project to the new owner.

Additionally, both the water diverted under the direct diversion right and the stored water is being put to beneficial use in meeting both PG&E's obligation commitments to El Dorado Irrigation District, and for generation at our Chili Bar powerhouse under License 2155.

Q What is the next place you would like to update?

A I would like to expand my answer to prior question 4 concerning the reservoir order in which PG&E has normally released water from the upstream storage. This issue was raised in my oral testimony. In a typical year PG&E would divert natural flow in the South Fork American River until such time as the flow was not sufficient to fill the El Dorado Canal, approximately 156 acre-feet.

As the natural flow would decrease, water would be released from storage in an amount that would continue to keep the canal full. Lake Aloha would have been the first to have the water withdrawn, followed by Caples, Silver and Echo.

This order was maintained so as to allow recreational use, especially at Silver and Echo throughout the summer. After Labor Day, all reservoirs would be drawn down to make room for the coming winter runoff.

Q In fact, is there anything you are aware of in your FERC license that would address the issue of keeping levels up in any of these reservoirs?

A Yes. Our Exhibit 2 in our license dictates the order in which we draw on these reservoirs.

Q Does PG&E operate Caples Lake with the intention of carrying over storage from one year to the next?

A Only that our objective is to hit the minimum pool of 2,000, which is the FERC minimum pool for Caples Lake.

Q Can you explain why PG&E sometimes has water left in storage above the minimum level and in which months?

A Generally we have water left in storage. The other lakes, Echo, Silver and Aloha are drafted down to zero. We retain water for operating the canal through the period of December, January and February, not knowing exactly what the uncertain winter conditions are going to provide. That water is used to float snow, keep the canal open so that we don't lose it for the rest of the season, with the objective of heading toward 2,000 acre-feet.

Q And is typically water available for use by Kirkwood?

A No.

Q How would PG&E have to reoperate Caples Lake in order to provide 500 acre-feet to Kirkwood, and how does the timing issue come into play?

A We would have to reserve 500 acre-feet in and above our comfort level for maintaining water for use in our El Dorado Canal for the months of December, January and February, so that would alter our operation for that lake.

Q In your opinion, is it likely that PG&E would get back and put to beneficial use water that's diverted for

snow making?

A No, and even in a typically dry year such as 1977, it's a matter of time of use. The water in the runoff period down at El Dorado diversion exceeds canal-carrying capacity in a dry year by four to five times the diversion, so the water that is released at that time from snowmelt would not be captured and put to beneficial use.

MR. MOSS: I have no further questions.

MR. STUBCHAER: Thank you.

Who wishes to cross-examine this witness?

Mr. Gallery.

MR. GALLERY: I have just a few questions about PG&E's operation, Mr. Stubchaer, but I have to say first I agree with Mr. Moss, that this Board has no authority to reorder the reoperation of this FERC project, that the project can be operated for power production as prescribed and authorized by the FERC license.

My questions would assume, however, that if it were being operated for consumptive use, it might be operated differently if someone were operating it with that in mind as well.

CROSS-EXAMINATION

by MR. GALLERY:

Q Mr. Lynch, you say that PG&E draws down Silver after Labor Day, and in the months of October and November -- let's see, you start drawing it off in September and then go through October and November?

MR. LYNCH: A That's correct.

Q Is the value to the company for power production any different in September or October or November, or is the power value essentially the same during those months?

A The power value during those periods of time are higher than they are in the wintertime.

Q But, as among those two months, is it any more valuable in September than in November, or in October rather than November?

A It would depend upon what other resources are available in the hydroelectric mix. It generally is increasing in value as we hit into the winter period.

Q Well then, let me ask you this: You have to have your reservoir down to spillway level under your dam-safety requirements by November 1?

A That's correct.

Q Well, given that Silver Lake is leaking in the summertime, it is unavoidably coming down as you approach Labor Day, and even would continue after that; is that correct?

A That is correct.

Q Would it be a problem not to start any releases during the month of September, and instead, go ahead and draw it down to spillway in October and November? Is there some reason why you would start to draw right after Labor Day as opposed to waiting until October 1? Could you draw it down if you started October 1 by November 1?

A We could probably draw it down by November. The longer we wait with our uncertain weather conditions, we would risk not being able to use that water, so by the first

of December, warm rain storms have come in and usually we will have inflow to the diversion off the South Fork of the American. So, if we waited too long into the season, we risk losing that water.

Q I see. And is that date about December 1 that you would have to start worrying about?

A Probably November 1.

Q Is that the date that you have to be down to spillway level, November 1?

A Yes.

Q I wanted to also ask you, the FERC requirement for fish releases from Silver is two second-feet?

A That is correct.

Q Did I understand that earlier your practice was to release more than that, four second-feet?

A Yes. FERC is not forgiving if we have an average day of 1.99 cfs, so it's within our policy and our guidelines to over-release the fish water to avoid those situations.

Q I see. And to know that you are meeting that two second-feet or more, there is a gage; isn't there, downstream from the dam that can be read?

A That is correct.

Q Is that release effected by opening the outlet pipe or does it go over the fish ladder? How do you manage that to see that you are making that fish release?

A It goes through a self-cleaning weir that is calibrated and recorded every 15 minutes on a digital recorder. Calibration measurements are made at the site once per month by streamflow measurements.

Q If you were looking at how much water is going to be coming into Silver Lake in any given spring, would it make sense to you to look at the Department of Water Resources' snow survey projections at Folsom, or would it make more sense just to look at the projections from your own snow-course reading in your own Silver Lake basin?

A Our license is tied to the projections at Folsom, and it would probably make greater sense to have them on what the snow/water equivalent bears to normal rather than down at Folsom. We have had a number of years and we have small -- basically Caples and Silver is a small storage system in relation to Folsom and the entire inflow to that area. So, we have had a number of years where we get down to one million forecast and DWR will be one million ten thousand, and that puts us into normal conditions.

It somewhat biases the fish releases on the project to near more normal-type conditions.

Q When you say your license is tied to the inflow at Folsom, you are talking about your FERC license fishery requirements?

A FERC license, yes.

MR. GALLERY: I believe that's all I have, Mr. Stubchaer.

MR. STUBCHAER: Thank you.

Does staff have any questions?

All right. I didn't see any other hands.

Mr. Volker.

MR. VOLKER: I apologize, I didn't raise my hand. I

was scribbling something at the time.

CROSS-EXAMINATION

by MR. VOLKER:

Q Good afternoon, Mr. Lynch.

MR. LYNCH: A Good afternoon.

Q When did FERC impose the minimum fish-flow requirements in the South Fork American River drainage?

A The ones we are currently operating under?

Q Let me back up. Could you recite the changes that have been made by FERC in minimum fish-flow requirements for Caples Creek, Silver Fork and South Fork American at Kyburz, and also, Pyramid Creek, those four locations?

A I will cite you directly -- for the South Fork American River near Kyburz?

Q Yes.

A We have a requirement in normal water years of 50 cfs from January through August 31, 38 cfs for September 1st through September 30, 43 cfs from October 1 through October 31, and then back to 50 cfs from November 1 through December 31.

Q All right, and would you tell us the definition of a normal year as used in the FERC fish-flow requirements?

A It's the amount of natural flow that bears to Folsom forecasted by the Department of Water Resources on April 1 and revised May 1 as it bears to, I believe, one million acre-feet.

Q Does one million acre-feet represent more or less average inflow over the last 50 years to Folsom?

A No.

Q What is the average inflow to Folsom for the last 50 years, if you know?

A I couldn't answer that.

Q So, if the projected inflow to Folsom as of April 1 and as revised May 1 projected by the Department of Water Resources exceeds 50 percent of one million acre-feet, it is considered a normal year?

A If it is above a million acre-feet it is a normal water year. If it below that, the releases go 18 cfs January 1 through August 31, 10 cfs September 1st through September 30, 15 cfs October 1 through October 31, 18 cfs November 1 through December 31.

Q Thank you. And when were those limits imposed?

A To my recollection, those were imposed under the relicensing of Project 184. I believe it was in the year 1987, somewhere, give or take a year.

Q There were a series of amendments to the PG&E FERC license in the 1980s; were there not?

A Yes.

Q And it was one of those?

A It was one of those that were added as an amendment.

Q Was there any minimum FERC flow applicable to the South Fork American River at Kyburz prior to that time?

A Yes, it was five cfs.

Q And was that for all years?

A Yes.

Q Did PG&E alter its operations of these applications in response to that change in the minimum fish-flow

requirements dictated by FERC?

A Yes.

Q Is it true then that historic operation of these lakes as it existed prior to the 1980s no longer exists?

A That is correct.

Q So, there has been a substantial reoperation of the lakes since this point in the 1980s when the FERC permit was revised to adopt the minimum fish flows that you set forth?

A Define substantial.

Q Releases in the summertime were increased as necessary to meet the FERC minimum flow requirements?

A Yes.

Q Now, with respect to the lake, could you give us the FERC minimum flow requirements for each of the lakes?

A From Pyramid Creek near Twin Bridges, is two cfs normal or dry; Caples Lake outlet near Kirkwood is five cfs, normal or dry; Silver Lake outlet near Kirkwood is two cfs year-round, normal or dry.

Q All right, and do you recall when those minimum flow requirements were adopted by FERC?

A During the original licensing of the project, I don't believe they were revised.

Q And the original license was in the late fifties, could you give us that date?

A Couldn't give you the exact date, but it would be in the mid-fifties, sixties, somewhere.

Q Could you explain the concept of ramping as employed to satisfy fish minimum flows?

A Yes. It's to ramp up our releases, we have ramping rates at Silver and Caples to avoid stranding fish to allow gradual increases in the streamflow.

Q And are there ramping rates both when increasing flow and decreasing flow?

A Yes.

Q Can you tell us what those are?

A When we are within the notch of the weir, I believe it is one foot per hour. It changes then to, I believe it is ten percent of the flow above that per hour.

Q Forgive me, I am not an engineer. I didn't quite follow that explanation.

Let me tell you what I understood you to say is that when you are measuring the flow by a notch in the weir --

A In order to sensitive the flow, we go through a low-flow notch and the relationship of the river stage rise is different once you get over the entire notch, so a one-foot rise within the weir does not equate when you have a full stream.

Q So that when you are above the weir, you ramp it at the rate of ten percent?

A Ten percent of the flow.

Q How was that ascertained?

A That would be a flow meter of some kind. That is recorded on a 15-minute basis.

Q And that's recorded by a continuous flow meter located downstream?

A Yes.

Q The continuous flow downstream from Caples Lake is

located on only one of the two outlets?

A Yes.

Q Which outlet is that?

A At Caples?

Q Yes.

A That is monitoring the ramping rate is known as gage A6 and it is located downstream of the outlet valve.

Q So, that is the outlet on the eastern side of the lake?

A Yes.

Q And the other outlet is in the northern side?

A Yes, that would be spilled water.

Q Are you familiar with the construction of a fish ladder at the eastern outlet to Caples Lake?

A Yes.

Q Do you know when that was built?

A I would only venture a guess, early sixties.

Q Was that fish ladder ever maintained?

A I believe it was maintained.

Q Was it constructed by PG&E?

A Yes.

Q Do you know how long it was maintained?

A No, I don't.

Q Do you know whether it is presently in use?

A I do know it is presently not in use.

Q In fact, it's built on gravel?

A That is correct.

Q Do you know how long it's been built on gravel?

A My present knowledge, between ten and fifteen years.

Q Did FERC issue any direction to PG&E with regard to the construction and maintenance of that fish ladder?

A The fish ladder was an issue, and I believe we had direction from FERC it was not a part of the project features any longer and not required for any biological interaction with the stream and the reservoir.

Q Was that a formal amendment of your license?

A I couldn't answer that.

Q And did that directive take place in approximately the same time frame, ten to fifteen years ago?

A Yes.

Q Do you know if the California Department of Fish and Game reviewed that decision to dispense with the fish ladder?

A Yes, they did.

Q And they okayed it?

A To my knowledge, yes.

Q Do you know if they did that based on any environmental review?

A I couldn't answer that either. That would be up to our biologist.

Q Are you familiar with the fish ladder at Silver Lake?

A Yes.

Q Has FERC issued any direction with regard to the maintenance of that fish ladder?

A Not to my knowledge.

MR. SOMACH: Objection to this line of testimony.

While it is very fascinating, it is not relevant to either

the protests or the direct testimony that was offered. It has to do with the operation of PG&E facilities which are FERC-related issues, not the State Water Resources Control Board-related issues.

MR. STUBCHAER: Mr. Volker.

MR. VOLKER: I think it is part of the overall complex factors that must be considered in ascertaining two things; one, what is the historic operation of the facilities in terms of FERC-mandated releases, and secondly, what are the environmental impacts of operating these dams in the manner in which they have been operated historically and are proposed to be operated in the future.

MR. STUBCHAER: It seems to me the releases are independent of whether or not the fish ladder is operating.

MR. VOLKER: The fish ladder has to be operated and it requires water.

MR. STUBCHAER: He has already testified to what fish releases were required and I presume those are independent of whether the fish ladder is operating or not.

MR. VOLKER: I think that's a good question to ask him.

MR. STUBCHAER: And if so, maybe we can leave the fish-ladder question.

MR. VOLKER: I have a few questions on how the fish ladder operates on Silver Lake as to where the water is taken, whether it is taken off the top of the lake or from some point beneath that.

MR. STUBCHAER: Is that the last of the fish-ladder questions you have?

MR. VOLKER: I think we are wrapping down on fish ladders.

MR. STUBCHAER: Is that about three questions per minute?

MR. VOLKER: I am working as fast as I can.

Q Has FERC issued direction with regard to whether the fish ladder at Silver Lake must be maintained year round?

A I don't recall any direction. Our compliance points are at the gages downstream. We have no compliance to my knowledge at either fish ladder.

Q And do you know if the fish-release flow is always released through the fish ladder?

A Not intimate knowledge of whether it is always released through the fish ladder.

Q It is possible that it is frequently released from a point other than the fish ladder; isn't that true?

A That could happen, yes.

Q When it is released through the fish ladder at Silver Lake, is the water taken from the top of the reservoir or from some point below the surface of the reservoir?

A How far below the surface?

Q I don't know, do you?

A Maybe, but how far? It's always a point of how far below the surface water releases are made. Sometimes 100 feet below the surface water is not sufficient for biological needs, but is it in a range of a foot, or ten feet, or what are you asking?

Q That is what I am asking, the point at which the fish

ladder at Silver Lake receives water from the lake is several feet below the surface of the lake when full; isn't it?

A Yes.

Q Do you know if that's an effective means of assuring migration of fish when the lake is full?

A I couldn't answer that. You would have to ask a biologist.

Q Finally, with respect to Lake Aloha, is it your understanding that the FERC fish-flow minimum requirement allows PG&E to open the release valve on the lake completely and drain the lake as quickly as that release valve will allow every year?

A That is one of the first lakes that we withdraw water, and we do open the valve up to usually 20 or 30 cfs to get a draft.

Q That's 1200 to 1800 acre-feet per month?

A That is correct.

Q And that results in the determination of outlet flow in the late summer; does it not?

A It is down to natural flow which generally stays about three cfs.

Q It often drops below two cfs; does it not?

A I would not characterize it as often.

Q Have you had an opportunity to review the Pyramid Creek flow records to ascertain whether, in fact, the FERC minimum-flow requirement has been satisfied since that requirement was adopted?

A Yes.

Q Would you please refer to that material and then I have a question for you.

A I did not bring that data with me.

Q Is it PG&E's position that to the extent it is feasible to do so, the minimum fish flow out of Lake Aloha must be maintained year round?

A It is every year -- well, actually every eight months we run what we call an internal fish-water audit report and that program searches for areas of noncompliance, and to my knowledge, we have had no noncompliance dates on the project.

Q And during what period of time?

A Oh, gosh, the last five years, ten years.

Q And prior to that period of time, did PG&E monitor the flow recorder on Pyramid Creek to ascertain whether it is satisfying FERC minimum requirements?

A Yes, we did.

Q Is it your understanding during the prior period as well you satisfied the requirements?

A Yes.

Q If there were a year in which draining Lake Aloha at the 20- to 30-cfs rate you have described it would result in flow releases in the late summer of less than three cfs, would it be feasible for PG&E in anticipation of that possibility to release water at a lower rate earlier in the summer?

A That depends upon the project demands downstream and what type of water year we are having. Many times natural

flow -- well, for example, this year we had heavy natural flows through July and early August, so it is heavily dependent upon the type of year that it occurs.

Q Well, could you tell us in what types of years it would be feasible from the standpoint of operation and demands to lower the rate of release in the early summer from the 20 to 30 cfs rate?

MR. MOSS: Excuse me, I don't think he testified in the affirmative to that statement, that it was feasible or that we whatever. I don't think we are at that point.

MR. STUBCHAER: He said it depends.

MR. VOLKER: Right.

Q I don't mean to put words in your mouth. Please explain, are there circumstances in which it would be feasible for PG&E to release water at a lower rate from the 20 to 30 cfs you have described in anticipation of noncompliance with the 2 cfs outflow requirements in the late summer in an effort to assure compliance?

A Well, to my knowledge, we have never had a noncompliance period in the last ten years, so I don't know what the issue is.

Q When you say noncompliance, are you understanding that term to refer to something other than a flow less than 2 cfs?

A Would you restate that?

Q You have used the term compliance in a way that raises the question whether by that word you mean something other than flows less than 2 cfs.

Maybe I should put it a different way. That is a rather awkward way to put it.

If Lake Aloha is operated in a manner that results in outlet flows less than 2 cfs, does that necessarily result in noncompliance, in your view?

MR. MOSS: I object. That is a legal conclusion as to what is compliance with the FERC license, and he stated he doesn't have any factual basis to respond to the hypothetical, and that as to a legal question, he hasn't said that he has knowledge of what is required by FERC.

MR. STUBCHAER: We don't know if a noncompliance is instantaneous, mean daily, mean weekly. I still wonder about the relevance of this line of questioning to the water rights applications before us, and also, the time allotted for cross-examination has expired and you spent a lot of time on stuff that I don't think is really that relevant.

I have been lenient with you hoping that you could conclude and we could get on. How much more do you have?

MR. VOLKER: Thank you. I would be happy to explain.

I think this is relevant because during certain times of the year, typically September and October, there is no recorded flow or very minimal flow in Pyramid Creek suggesting to some perhaps there is noncompliance with the two cfs requirement.

The witness has testified that PG&E conducted a self-monitoring review of the compliance and has found compliance over the past five or ten years and before.

My question simply is, what definition of compliance was embodied in that self-monitoring program?

MR. STUBCHAER: How is that related to the water rights before us?

MR. VOLKER: It is related to the water rights, Mr. Stubchaer, because hopefully this Board would not make a decision based on the assumption a FERC minimum flow requirement would continue to be violated. Rather, I would expect this Board would assume whoever owns this project will operate it consistent with FERC's minimum flow requirements that would result in additional flows, I believe, in the South Fork American River at Kyburz in the late summer of many years.

MR. STUBCHAER: And he has testified that they haven't been out of compliance, and now you are exploring what compliance is, and I am going to sustain the objection.

Mr. Taylor, did you want to say something?

MR. TAYLOR: I don't, thank you.

MR. VOLKER: I would just ask for reconsideration because it is a proper cross-examination question. If the witness has used the term compliance, I think we need to know what he meant by it.

MR. STUBCHAER: The objection was based upon the fact it called for a legal conclusion, I think.

MR. MOSS: Not only that, but I again restate that while we have been very tolerant here in terms of just exploring the factual basis here, this is now alleging non-compliance with the FERC license, to which clearly the Board has no jurisdiction, and, in fact, if Mr. Volker's client wants to pursue this, they are free to do so before FERC.

MR. VOLKER: That is not part of the question at all. I think I explained the basis for the questioning.

Thank you.

MR. STUBCHAER: Thank you.

Ms. Lennihan.

MS. LENNIHAN: Thank you. First of all, I would just like to start by saying that Mr. Moss's introduction regarding the settlement between Kirkwood and PG&E is something with which we completely concur.

In the present absence of that settlement, we just have a few questions to ask of Mr. Lynch.

CROSS-EXAMINATION

by MS. LENNIHAN:

Q Mr. Lynch, I am going to talk a little bit about the period of historic record which is from 1934 through 1992 or 1993.

Can you tell me in what percentage of years from that record Caples Lake fills and spills in the spring?

MR. LYNCH: A Probably between 85 and 90 percent of the time.

Q How many years out of that period of record has greater than 2,500 acre-feet been left in storage in Caples Lake through the winter?

A I don't have all the records with me, but I know in 1987 we got down to 2,400. I believe in '88 or '89 we got very close to 3,000.

Q If I could ask you to answer the question which is how many years out of the period of record has greater than 2,500 acre-feet been left in storage?

A I couldn't answer that without all the records.

Q Do you contend that the data contained in the tables which are attached as Kirkwood Exhibit 6-B are incorrect?

A I have never seen them.

Q So, you have not reviewed Kirkwood Exhibit 6-B?

A No, I have not.

Q Have you reviewed any of Kirkwood's exhibits?

A No, I have not.

Q Can you tell me in how many years since the minimum pool requirement was imposed by FERC how storage in Caples Lake gone below 2,500 acre-feet?

A Prior to the minimum pool?

Q Since the minimum pool was imposed.

A Oh, since, not offhand, no.

Q Does PG&E directly divert water from the South Fork of the American River to the El Dorado Canal?

A Yes, it does.

Q What percentage of the diversions, in fact, in that canal are direct diversions as opposed to redirect diversion from storage?

A I would only have to venture a guess, 25 percent, somewhere in that neighborhood.

Q On what facts do you base that guess?

A Just review of the records and not doing a study, to answer the question, just on personal knowledge of the flows in the records that occurred in that entire system.

Q When PG&E rediverts from storage from the South Fork of the American River into the El Dorado Canal, from what places of storage is that water derived?

A From Lake Aloha, Echo, Caples and Silver.

Q Thank you. You have not testified that you haven't reviewed any of Kirkwood's testimony or exhibits, and perhaps the answer to this is obvious, but just to make the record clear, have you independently determined that any of the data which is attached to Kirkwood Exhibit 6, Mr. Wagner's testimony, is incorrect?

A Listening to Mr. Wagner's testimony, I would have to say yes, his testimony was incorrect.

Q And in what respect was his testimony, what data on which he relied was incorrect?

A The overall direction that 500 acre-feet has no impact on PG&E. It would lower our -- it's a matter of time of use out of Caples Lake. Granted, the water comes down from Kirkwood in the springtime, but at a time when in a normal year the flows at the El Dorado diversion is around 1500 to 2,000 cfs, and you have no potential of capturing that water.

Q I have here a table that is historic end-of-month water surface elevation from Caples Lake during that period of record, which is Table 1 in KW 6-B.

Do you contend that the data contained in this table is incorrect?

A Never having seen it, I can't draw a conclusion as to whether it is or isn't. If it is from the Geological Survey, it was data we produced and is public knowledge that that's that data.

Q And if it is that data, would it be correct?

A It would be correct.

Q Now, I was going to walk you through some of the other tables that are -- there are 13 attached to Mr. Wagner's testimony. In the interest of time, perhaps I should ask you if you've independently determined that any of that data is incorrect?

A Well, once again, I would have to review the data to make sure it is the correct data to make that determination.

MS. LENNIHAN: Thank you, no further questions.

MR. STUBCHAER: Anyone else?

Mr. Gallery.

MR. GALLERY: Mr. Stubchaer, Mr. Lynch's response to one of Mr. Volker's questions puzzled me.

CROSS-EXAMINATION

by MR. GALLERY:

Q I understand that in Mr. Hannaford's material that he has put together in this case, that he indicated at one point in the material that when the new increased fish flows went into effect in 1985, that PG&E went ahead and absorbed that increase out of the water that it would otherwise have used to generate power.

In other words, instead of taking it down the canal to generate power, it went down for fish flows.

MR. LYNCH: A That is correct.

Q So that when Mr. Volker asked you, did you reoperate the lakes after the new fish flows --

A We reoperated the powerhouse.

Q I see, but the regimen or the pattern of operating the lakes continued after 1985 in the same way as before?

A Basically, yes.

MR. GALLERY: Thank you. That's all.

MR. STUBCHAER: All right, staff.

E X A M I N A T I O N

by MR. LAVENDA:

Q I would like to get further interpretation from Mr. Lynch on the comments that Mr. Moss made in his opening remarks when he referred to the historical operations as mythical.

Can you elaborate on what might have been inferred, or can Mr. Moss?

MR. LYNCH: A I would defer to Mr. Moss.

Q To further explain what was meant?

MR. STUBCHAER: He is not a witness. Would you like to explain?

A What he was referring to was that the natural variation of the snow-water melt and variations in precipitation conjure up all different types of operating scenarios that would be imposed upon the project.

MR. LAVENDA: Q All different kinds, wet --

A We never experienced a normal water year on the project. They're either extremely wet or extremely dry years.

Q It would be logical to assume that future operations, regardless of the ownership, might follow a similar pattern?

A Absolutely.

Q So, we don't have an average or a normal, excluding spills during filling; could you give a numerical value for how much water is released from storage in Caples over the

period of one year, one water year?

A Out of Caples Lake?

Q Caples, yes.

A Probably in the neighborhood in round numbers, 30 thousand, 28 to 30 thousand.

MR. TAYLOR: Does that assume the lake is full at that time of year?

A He asked for a year.

MR. LAVENDA: Q One season. Excluding spill, this would be fill, release and then refill, 30,000, that is what we can consider a normal year?

A Normal?

Q Can you characterize what portion of that 30,000 would have been used to meet the 1919 El Dorado Irrigation District contract commitment?

A Out of Caples Lake?

Q Yes.

A Two thousand.

Q Are there similar numbers available to meet the 1919 contract agreement for Silver Lake?

A Yes, 5,000 acre-feet for Silver.

Q And how about Aloha?

A None.

Q Does PG&E monitor the water contract deliveries to El Dorado Irrigation District?

A We record the water deliveries every 15 minutes.

Q Where in the system?

A At the El Dorado forebay we have a weir that monitors the elevation over the year and the delivery rate to El Dorado.

Q And you keep records of the inflow to the El Dorado Canal at Kyburz; do you not?

A That is correct. That is a part of our FERC license requirement.

Q Can you differentiate between water released from storage and rediverted at Kyburz and water occurring under natural flow conditions in the South Fork American at Kyburz?

A It is possible to do it through the system of gaging that is on the system, but we don't currently do that, keep a daily account.

Q But you monitor how frequently at the forebay?

A All of the gages on the entire system are monitored every 15 minutes.

Q And it is possible to differentiate between natural flows diverted at Kyburz and releases captured at Kyburz into the El Dorado Canal?

A Yes, it would be possible.

Q I forget, is there a gage at Aloha at the outlet?

A It's below Pyramid Falls.

Q I believe your response to Ms. Lennihan was the difference between direct diversion and rediversion at Kyburz was characterized like 25 percent, but I forget which of those two quantities -- does that 25 percent represent direct diversion or rediversion?

A Rediversion.

MR. LAVENDA: Thank you.

E X A M I N A T I O N

by MR. CANADAY:

Q Are you aware of any other sources of water contributing to Pyramid Creek besides Aloha?

A There are some upstream reservoirs that were operated by Fish and Game that are used for maintaining fish flow or water flow in the creek.

Q Is that water that is released from those upper lakes above Aloha, is that passed through your system and on down Pyramid Creek?

A Yes.

Q So you have the ability to make an accounting of that water, that fish water from Fish and Game and the water that comes from Lake Aloha?

A They are all mixed together basically. There is no way of hydrologically separating them out.

Q So, if there was two cfs or greater released from the Fish and Game reservoirs, there would be water released to Pyramid and PG&E wouldn't be able to tell if that was their water then making the fish release or PG&E's fish release?

A You would not be able to separate it out unless there were records kept as to what was Fish and Game's water.

Q As far as you know, you have no records of how they operate those lakes?

A We used to have an agreement when we made visits back to Lake Aloha to regulate their facilities.

Q Do you do that now?

A Not any more, no.

Q Do you know what the storage is of those reservoirs?

A No, I don't.

Q Do you have a ballpark figure? Is it 100 acre-feet, or 500 acre-feet?

A I would say it is between that estimate.

Q Between 100 and 500?

A Yes, it is very small.

MR. CANADAY: Thank you.

MR. STUBCHAER: Mr. Taylor.

MR. TAYLOR: No.

MR. STUBCHAER: Any redirect?

MR. MOSS: No, sir.

MR. STUBCHAER: All right.

MR. MOSS: We would offer as an exhibit only the -- it is not even marked, but it is basically testimony of Frank R. Lynch, and it includes as an attachment his previous testimony, which is already in the record.

MR. TAYLOR: We have identified the testimony as PG&E 95-1 and the exhibit as 95-2.

MR. MOSS: Very good.

MR. STUBCHAER: Any objection? Hearing none, they are received.

Thank you very much.

MR. MOSS: Thank you.

MR. STUBCHAER: Sacramento Municipal Utility District, Ms. Dunsworth.

MS. DUNSWORTH: Good afternoon, Mr. Stubchaer and staff.

I am Leslie Dunsworth, attorney for Sacramento Municipal Utility District.

Before we present our testimony today, I have a point of clarification that I would like to have for Mr. Taylor.

From the testimony of the witnesses appearing on behalf of Alpine County and Mr. Volker's response on behalf of his clients, Kirkwood Meadows Public Utility District, it is the District's understanding that the consumptive-use portion of the parties' applications have been suspended.

If so, does that mean that to receive an appropriation, there must be a newly noticed proceeding?

MR. TAYLOR: Let me ask you a question, a new hearing by the State Water Board or a newly noticed application?

MS. DUNSWORTH: A proceeding, a hearing. We are looking at whether or not we should proceed with our testimony or truncate it to eliminate those portions of it that address those.

MR. TAYLOR: Just a moment. Let me check something here with my fellow staff members.

(After consultation)

It is not clear to staff that the consumptive-use elements of both of those applications would have been withdrawn at this time. It is true there was no affirmative case put on in support of those applications, but those applications were not withdrawn and from staff's point of view are still pending.

MS. DUNSWORTH: Then, we will proceed with all of our testimony.

We have a couple of housekeeping matters before we get started. First, as to exhibits, I would ask that the District's testimony and exhibits be marked as follows:

As to El Dorado project, we would like to have staff consider those as SMUD 95-1 and 95-2.

As to all other applications for which we are giving testimony, we would like those exhibits to be referred to as 95-A-1 through 10.

I apologize for that inconvenience. We were not quite sure how this was going to proceed.

In addition, since the District has withdrawn its protest to the application of Kirkwood Associates, Inc., I would request that that portion of our testimony be withdrawn at this time.

With that, Mr. Stubchaer, we will proceed to the witnesses.

MR. STUBCHAER: All right.

MS. DUNSWORTH: The witnesses we have here today are Al Ortega and Brian Jobson.

DIRECT EXAMINATION

by MS. DUNSWORTH:

Q Mr. Ortega, would you state your full name for the record.

MR. ORTEGA: A My name is Al Ortega.

Q Have you taken the pledge, Mr. Ortega?

A Yes, I have.

Q What is your current title at SMUD?

A I am the Manager of Generation Operations for SMUD.

Q Is SMUD Exhibit 95-A-8, or what used to be SMUD 8, a

true statement of your qualifications?

A Yes, it is.

Q Is SMUD Exhibit 95-A-1, what used to be 1-A-2, a correct copy of your written testimony for this proceeding?

A Yes, it is.

Q Were SMUD Exhibits 95-A-2 through 7 prepared at your direction and control?

A No, the original documents were prepared under the direction and control of my predecessor, John Hiltz. However, the review of the documents for submittal to the Board were reviewed under my direction.

Q Mr. Ortega, although you have indicated you do not intend to summarize your testimony at this time, a minor modification to your testimony is needed; is it not?

A Yes.

Q The modification should be made to SMUD Exhibit 95-A-1, which is Mr. Ortega's testimony. On page 6 beginning on line 9, the reference in this paragraph is SMUD Exhibit 6-A through C, when, in fact, it should be to 2-C, 2-B and 2-A.

To clarify, Mr. Ortega, would you please read the last two sentences of the first full paragraph as they should be.

A SMUD Exhibit 2-C graphically depicts the changes in the District's UARP water to storage patterns for dry years since 1990. The SMUD Exhibit 2-B and 2-A do, likewise, for average and wet years respectively.

MR. LAVENDA: Ms. Dunsworth, could you reidentify that passage, please, of Mr. Ortega's testimony.

MS. DUNSWORTH: Page 6, beginning on line 9, the last two sentences of the first full paragraph, I believe.

MR. LAVENDA: Thank you.

DIRECT EXAMINATION

by MS. DUNSWORTH:

Q Would you please state your full name for the record.

MR. JOBSON: A My name is Brian Jobson.

Q Have you taken the pledge?

A Yes.

Q What is your current position with SMUD?

A Senior Power Contract Specialist.

Q Are SMUD Exhibits 95-2 and 95-A-10 true and correct statements of your qualifications?

A Yes, they are.

Q Are SMUD Exhibits 95-1 and 95-A-1 true and correct copies of your testimony for this proceeding?

A Yes.

Q Do you wish to summarize your testimony at this time?

A No.

MS. DUNSWORTH: We are going to rely on written testimony and we are available for cross-examination.

MR. STUBCHAER: That's refreshing.

All right, who wishes to cross-examine this panel?

I see Mr. Gallery tentatively raising his hand, looking around to see who else is going to stand.

Seeing only one hand, I will call Mr. Gallery now.

CROSS-EXAMINATION

by MR. GALLERY:

Q I am probably the least qualified to ask any of these

questions, but I will take a shot at it.

Mr. Jobson, and I really mean that, this may not make much sense to you, but the value of an acre-foot of water coming down in Slab Creek for power generation to SMUD, is it the same September, October and November, or is there a difference in the value to you for hydro-production in those three months?

Does the value change during those three months or is it essentially the same?

MR. JOBSON: A We have valued water for hydro-power generation as essentially the same. In our testimony we did not go into level of detail to determine if it was a different value for each particular month. If it was different, it would not be significantly different during those months.

Q And one more question, you indicated in here that the appropriate compensation agreement in 1996 dollars would be \$22 for a megawatt hour escalated.

Could you translate that into an acre-foot value just generally?

A The testimony reflects a value for kilowatt hour or per megawatt hour, and then there is a conversion factor depending on each power plant for how many megawatt hours each acre-foot produces.

Q But at Slab Creek, what would be the value at the White Rock powerhouse?

A The conversion factor at White Rock powerhouse, I believe, is .69 megawatt hours per acre-foot. I haven't run the math on that. In a brief recess we could do that, but it is a fairly straightforward calculation and anybody could run it.

Q Mr. Ortega, do you have it?

MR. ORTEGA: A No, I don't.

MR. GALLERY: That's all I have.

MR. STUBCHAER: Staff, any questions?

All right, thank you.

Any redirect?

MS. DUNSWORTH: We have no redirect, Mr. Stubchaer.

The District offers SMUD Exhibits 95-1 and 95-A-1 through 10 into evidence.

MR. STUBCHAER: Any objection? Hearing none, thank you very much, they are received.

MS. DUNSWORTH: Thank you.

MR. STUBCHAER: Bureau of Reclamation, Mr. Turner.

MR. TURNER: Thank you, Mr. Stubchaer.

I have a couple of details before we start. First of all, we had identified three witnesses in our Notice of Intention to Appear. One of those witnesses, John Davis for the Bureau of Reclamation, is not going to be available today, and so we have replaced him for purposes of cross-examination with one of the members of his staff, Kay Moore, who is the individual that testified at the previous hearing we had on the El Dorado County and El Dorado Irrigation District applications. She will be appearing simply for purposes of cross-examination should any questions arise in her area of expertise.

Secondly, John Renning will be the sole witness I

will be calling and we presented his written testimony.

And just to summarize, essentially what Mr. Renning would be advising the Board is that the testimony that we presented at the previous hearing on the earlier applications by El Dorado County and El Dorado Irrigation District is still applicable to these amended applications, and we will be simply updating slightly by just making everyone aware that in light of the Central Valley Project Improvement Act essentially and what we have been talking about, Public Law 101-514, the Fazio water, that there has been a change in the demand for water from Folsom Reservoir which we feel should be taken into account in determining the impacts of these particular applications on the operations at Folsom Reservoir as they now exist.

And the only other thing I would point out, my final comment, would be, in the prepared testimony that was submitted for John Renning, we did present the testimony in two separate segments.

One was the testimony that was presented in support of the Bureau's protest to the El Dorado County and El Dorado Irrigation District applications.

The other testimony was presented in support of the Bureau's process to the other applications, and so, I think I will have him just present his testimony in that same framework, just to keep it distinguished.

Finally, in his written testimony in connection with the application by El Dorado County Water Agency and El Dorado Irrigation District, John pointed out to me recently that there was a typographical error that I would just like to correct.

In the second full paragraph on, I think it is the 11th line from the bottom, which starts with the words: Utility District for water service -- I am sorry, it is the following line that starts with: The contract with Sacramento County Water Agency. The next entity that is identified is listed as San Joaquin Water District. That should be San Juan, J-u-a-n, Water District, a slight typo.

So, with that, I would like to go ahead and call Mr. Renning to present his testimony.

DIRECT EXAMINATION

by MR. TURNER:

Q Mr. Renning, would you state your name for the record.

MR. RENNING: A John Renning.

Q And, Mr. Renning, did you take the oath already?

A Yes, I did.

Q Now, Mr. Renning, you appeared at the 1993 hearings in connection with the El Dorado County Water Agency and the El Dorado Irrigation District applications?

A Yes, I did.

Q Is the document entitled Testimony of John Renning Regarding Applications and Petition of El Dorado County Water Agency and El Dorado Irrigation District an accurate copy of the testimony you would like to present on that subject?

A Yes, it is.

MR. TURNER: I would request at this time that we

identify that particular exhibit. I know we have not given it an exhibit number.

Is there any specific designation that the staff would request or suggest?

MR. TAYLOR: With regard to the testimony, we have identified that as the Bureau's 95-1 and Mr. Renning's testimony and the balance of the application we identified as Bureau 95-2.

MR. TURNER: Thank you very much, Mr. Taylor.

Q Mr. Renning, would you go ahead and summarize your Exhibit 95-1 for the Board and the attendees.

A Yes. The grounds for the Bureau's protest on both the original and revised application and petition filed by El Dorado County Water Agency/EID, were presented and explained at the hearing on June 16, 1993. That testimony is in the record of this hearing.

In essence, the Bureau is convinced that the approval of these applications and/or petitions will have an adverse impact on Reclamation's exercise of its water rights on the American River and will interfere with its operation of the Central Valley Project. Reclamation is currently engaged in studies which pertain to the American River watershed. One of these studies is being prepared in connection with the programmatic Environmental Impact Statement for the Central Valley Project Improvement Act.

This Environmental Impact Statement is prepared to analyze the direct and indirect impacts and benefits of implementing the Central Valley Project Improvement Act. This includes all fish, wildlife and habitat restoration actions and the potential renewal of all existing contracts for Central Valley Project water.

This attempt is being done looking at year 2020 conditions and includes the projected increase in the development of non-CVP water rights. However, the screening criteria for this Environmental Impact Statement for the contract demands in that EIS excludes the contract for East Bay MUD from the Folsom South Canal and the contracts with the Sacramento County Water Agency for water service from Folsom Reservoir which Reclamation has been directed to enter into pursuant to Public Law 101-514.

Even with these exclusions, the preliminary model results indicate that the Central Valley Project is substantially constrained from meeting both the environmental and contract demands in the year 2020.

By approving these applications and petitions, the quantity of water which will be available to Reclamation to serve the multiple purposes of Folsom Dam and Reservoir in particular, and the Central Valley Project in general, will be reduced, thereby further exacerbating an already critical situation.

Q I just have one question for you, Mr. Renning. At the conclusion of your statement you are pointing out that the preliminary model result indicated that there would be some constraint in meeting contract demands, and by that term, were you talking about the demands within the watershed of the American River, were you talking about the export demands, or how broad were you using that term?

A Both. It will constrain our ability to meet both, the demand within the basin and within the American River watershed, and our export demand as well.

MR. TURNER: I have nothing further in connection with that portion of the testimony.

Would you prefer that he be made available on that and then keep the other separate, or --

MR. STUBCHAER: Do it together. We will take cross-examination on both.

MR. TURNER: Okay.

Q Mr. Renning, is Bureau Exhibit 95-2 an accurate copy of your testimony to support the protests that were filed in connection with the Kirkwood Associates, the Kirkwood Meadows Public Utility District, the County of Alpine and County of Amador?

A Yes.

Q And would you summarize that, please.

A Reclamation protests the applications and petitions filed by Kirkwood Associates, the El Dorado National Forest, which seeks permits to divert water from Caples Lake for snow making, and similar applications filed by Kirkwood Meadows Public Utility District and the El Dorado National Forest, which would seek to divert water from Caples Lake for municipal uses for essentially the same reasons that Reclamation protests the applications of the petitions filed by the El Dorado Irrigation District and the Agency.

Those reasons are that such permits will reduce the supply of water that is available to regulate at Folsom Reservoir, to serve the multiple purposes of Folsom Reservoir in particular and the CVP in general.

Reclamation recognizes that the amounts of water which will be consumptively used pursuant to the permits requested by these entities is insignificant in relation to the quantities of American River water Reclamation has appropriated.

However, Reclamation is concerned with the potentially significant impacts which will result from future grants of similar permits to others.

The Bureau does not anticipate that the grant of permits to the County of Amador Board of Supervisors and Alpine County Water Agency and/or County of Amador for the storage of water in Caples and Silver Lakes respectively for nonconsumptive uses will have any detrimental impacts on the water supplies available to Reclamation for the operation of Folsom Reservoir in particular, or the Central Valley Project in general.

Reclamation protested those applications primarily because Reclamation questions the authority of the Board to grant permits for storage of water for the nonconsumptive uses specified in those applications.

And that concludes my testimony.

MR. TURNER: I would have nothing further to present at this time, Mr. Stubchaer.

MR. STUBCHAER: Anyone wish to cross-examine this witness?

Mr. Somach, Ms. Lennihan, Mr. Gallery, Mr. Birmingham and staff.

All right, Mr. Somach.

MR. SOMACH: Mr. Turner, could for a point of clarification. Mr. Davis didn't submit any written testimony?

MR. TURNER: No, he did not. John Renning is the only direct witness for the Bureau.

CROSS-EXAMINATION

by MR. SOMACH:

Q Mr. Renning, if you will take a look at the written testimony that you just read, do you have that before you?

MR. RENNING: A Yes, I do.

Q If you take a look at the first paragraph, the last sentence, you said, in essence, Reclamation is convinced that the approval of these applications and/or petitions will have an adverse impact on Reclamation's exercise of its water rights on the American River and will interfere with its operation of the Central Valley Project.

The conclusion that the Bureau of Reclamation is convinced is based upon what technical analysis?

A It is based on the analysis that the diversion of water that would otherwise be available for potential use by Reclamation for El Dorado would have an adverse impact to us to the extent that we would otherwise be able to use it.

Q Do you know what the level of impact is?

A Ultimately it could be as much as 17,000 acre-feet.

Q But there is no specific technical analysis that the Bureau is wrong with respect to this project and its ultimate impacts upon either the water rights on the American River or how it would interfere with its operation of the Central Valley Project?

A No, we have relied upon the information that was provided in Exhibit 78 of El Dorado Irrigation District.

Q There is extensive reference in your testimony on the programmatic Environmental Impact Statement, and quite candidly, I am not certain of its focus, and is its focus that the amount of water that El Dorado here seeks to appropriate was not contemplated within the scoping and modeling that was done for the programmatic Environmental Impact Statement?

A The purpose of our reference to the studies that are being done for the programmatic Environmental Impact Statement are that regardless of whether we looked at certain demands which included the East Bay MUD, the 101.514 water, even excluding that water with the potential demands that we are looking at, vis-a-vis the Central Valley Project Improvement Act, we are going to be constrained in our operation of Folsom Reservoir in meeting our in-basin demands. That was the point of that testimony.

Q Well, what assumptions are made in the programmatic Environmental Impact Statement with respect to the base water rights that the Bureau of Reclamation has at Folsom?

A I can't speak to exactly what assumptions were made in those studies.

Q Does the Bureau of Reclamation ever review the permit terms and conditions in determining what its base rights are to the water?

A Yes, I think we do that.

Q Does the Bureau of Reclamation intend to adhere to terms and conditions within its permits with respect to water, in this case specifically under a permit for Folsom Reservoir?

A Yes, we do.

Q And those terms and conditions, are they considered to be part of the operation of the Central Valley Project or do they go into the operational constraints on the Central Valley Project?

A Yes, they are constraints that we have in the operation.

Q At the time of the initiation of the special 3409 programmatic Environmental Impact Statement, the first four days of these hearings had already occurred; had they not?

A You mean the hearing in 1993?

Q That's correct.

A Yes.

Q So that those hearings had occurred prior to the scoping and criteria and modeling for Section 3409 of the programmatic EIS?

A Yes.

Q And the Bureau of Reclamation, at least through you, was aware of the application for appropriation being made by El Dorado; is that correct?

A Yes.

Q And in addition, it was aware of allegations and arguments made by El Dorado with respect to terms and conditions within the Bureau of Reclamation's permit; is that correct?

A Well, I am certainly aware of them but I can't say for certain that the people that are undertaking the studies themselves are specifically aware of what your position on this issue is.

Q But you are the duly authorized representative of the Bureau of Reclamation before the State Water Resources Control Board on these applications; are you not?

A Yes.

MR. SOMACH: I have no further questions.

MR. STUBCHAER: Mr. Volker. You didn't raise your hand again.

MR. VOLKER: I was conferring.

CROSS-EXAMINATION

by MR. VOLKER:

Q Does the Folsom Dam discharge into the lower American River?

A Yes, it does.

Q What is the next dam downstream?

A Nimbus Dam is below Folsom Dam. It is a reregulation dam.

Q Is the lower American River between Nimbus and the Sacramento River designated by the State of California as a wild and scenic river?

A I believe so. I am not sure that's the exact title of the designation, but it is something like that.

Q Does El Dorado County Water Agency or El Dorado Irrigation District presently have a contract for the use of Folsom Reservoir?

A They have a water service contract with the Bureau. I don't believe that the contract is for the use of Folsom Reservoir.

Q So, they have no present entitlement to store water in Folsom?

A I don't believe so.

Q What contractual arrangements, if any, would be required before El Dorado could secure an entitlement to store water, and by that, I mean keep water in Folsom Reservoir more than 30 days?

MR. SOMACH: Objection. That was the subject of actually a Bureau of Reclamation witness at the first four days of hearing. There was cross-examination on this very issue, and it has not even been raised this time around except by Mr. Volker.

If you would like, you can go to the transcript and go back to that, but I thought the purpose of this hearing was to limit testimony to the new things that were presented.

MR. STUBCHAER: Since the last hearing, I believe you said you were only going to take water from Folsom and not the other points of diversion and rediversion upstream, so that could be a change.

MR. SOMACH: A change in what respect? Even those would require a contract with the Bureau of Reclamation.

MR. STUBCHAER: Mr. Taylor.

MR. TAYLOR: I don't have a comment. Go ahead.

MR. STUBCHAER: Mr. Turner.

MR. TURNER: I think it would be more appropriate in responding to that question about the proposed contract if we could have Ms. Moore come up and she can respond more directly to that than Mr. Renning can, if that would be acceptable.

MR. STUBCHAER: I am going to permit the question. Please come up, Ms. Moore.

MR. TURNER: Ms. Moore, would you state your full name for the record.

MR. BIRMINGHAM: Mr. Stubchaer, I am not sure Ms. Moore has taken the pledge.

MS. MOORE: Yes, I have.

My name is Kay Moore.

MR. TURNER: And, Ms. Moore, have you taken the pledge this morning?

MS. MOORE: Yes, I did.

MR. TURNER: Ms. Moore is now available to answer Mr. Volker's questions.

MR. VOLKER: Q Good afternoon. I had a question relating to the procedures by which a potential water user secures an entitlement to store water in Folsom Reservoir.

My questions are, what procedures would be required before El Dorado could secure an entitlement to store water in Folsom Reservoir for a period less than 30 days.

Then I will ask later about the period of more than 30 days.

MS. MOORE: A Okay. For the storage of non-project water in a federal facility, it is the use of the facility with excess capacity that we have a contract that is written

pursuant to the Warren Act of 1911, and that is the authorization to use the federal facility.

Q Then, a Warren Act contract is required where storage is sought for a period less than 30 days?

A Yes.

Q Has such a contract been secured in this case for El Dorado?

A No.

Q What impediments, if any, might prevent El Dorado from securing such a contract, to your knowledge?

MR. SOMACH: Objection, speculation.

MR. VOLKER: To her knowledge. If she knows of an impediment, she should share it with us. If she doesn't, she can say so.

A We enter into contract negotiations for a contract, and I can't tell you up front what type of impediments there are.

A How much time would be required in the normal course for such a contract to be negotiated and executed.

Q Are you talking about a contract for one year or less, or in excess of one year?

If you wish to break your answer down, that would be fine.

A The procedure for any contract in excess of one year is a much longer procedure. We enter Warren Act contracts every year for a period of one year or less, and it is a fairly quick process.

Q Meaning less than a month?

A We have a standard-form contract that we use. It could be done in less than a month.

Q And with regard to contracts for more than one year, what is the typical period, if any, for such contracts?

A I couldn't tell you.

Q How much time would be required in the usual course to negotiate and execute such a contract?

A Again, I couldn't tell you. We haven't entered into any long contracts in a very long time.

Q Since approximately what date?

A I don't know.

Q More than ten years?

A I don't know.

Q You indicated or you used the expression surplus. Could you explain to us what that means from your perspective?

A I don't recall I said surplus, I said excess capacity.

Q I think you did say excess and I misstated my own notes.

A It is my understanding this capacity is when there is space available above the project demands of the facility that the project would not be using.

Q And by project demands, you are referring to demands of the Central Valley Project?

A Right.

Q Is there presently an excess capacity in Folsom Reservoir?

A I don't know.

Q What department would one have to ascertain that from?

A I imagine you would have to go to Operational Studies to show that there is excess capacity at any certain time.

Q Do you know if operational studies necessary to ascertain whether there is excess capacity at present have been conducted?

A No.

Q Would such studies have to be conducted before a Warren Act contract for that water could be negotiated and executed?

A No -- well, I mean to the extent that you can enter into a contract, but that contract is only valid if you do have excess capacity, so you could have a contract for a year but not at all times during that year can you perform under that contract.

Q Sounds like buyer beware. Well, what are the ramifications of that, if I were El Dorado and I entered into a contract with the Bureau to store water, and no operational study had been done to determine whether there was excess capacity, and midway through, say, a one-year contract period, lo and behold, no more excess capacity.

What would happen to any water stored in your reservoir?

A If your water was stored in the Central Valley Project reservoir and the excess capacity no longer existed, your water would spill first.

Q Okay. Can either of the panelists tell us how often water spills from Folsom Reservoir?

MR. SOMACH: Objection. None of the applications that I am aware of even involves the question of storage of water in Folsom Reservoir. These questions are not relevant.

MR. VOLKER: Let me clarify.

Q Is a study of excess capacity necessary only if the storage sought is for a period in excess of 30 days?

A No.

MR. VOLKER: Then, I believe the question is proper.

MR. STUBCHAER: You may continue.

MR. VOLKER: Q How frequently, if you know, and you don't have to be precise if you don't know precisely, but how frequently, to your knowledge, has Folsom Reservoir spilled since its construction?

A I don't know.

MR. RENNING: A The question of whether Folsom spills or not is perhaps not really relevant to the issue of the Warren Act question. The question is whether the U. S. is going to be adversely affected by such a contract, and it would require investigating matters other than when Folsom spills.

Q Thank you for clarifying that and I will get to that, but can I just finish with the follow-up on this concept of operational studies to determine excess capacity. If no such studies have been done and El Dorado enters into a contract for storage of water for less than 30 days and the reservoir spills, does El Dorado use the water it stored?

MR. SOMACH: Objection. There is no such thing as a

right to store for less than 30 days. It is either a contract for use of the reservoir or for storage. It can't be both.

MR. VOLKER: I'll amend the question or use of the reservoir for less than 30 days.

MR. RENNING: A Well, Folsom Reservoir under spill conditions -- my answer to this question involves a whole bunch of hypotheticals that I am very very uneasy about talking about, and I am not sure that that's --

MR. STUBCHAER: Just answer to the best of your ability. If you can't answer it, then so state.

A If Folsom is under spilling conditions, it is unlikely that El Dorado would want to be storing water at Folsom at that time.

MR. VOLKER: Q And why is that?

A Because the system is full of water at that time.

Q And what would happen to El Dorado's water should the reservoir spill?

A I would presume it would go on down the American River.

Q So, in effect, you are saying El Dorado would lose the water they had?

A Well, again, this involves a whole bunch of hypotheticals that I don't think I can answer the question.

MR. STUBCHAER: I can see there are many combinations that could continue to divert rather than allowing it to spill and things like that, and there are a lot of hypothetical situations.

Could you focus in a little more on a particular scenario?

MR. VOLKER: I am trying to understand the viability of Folsom as a vessel in which El Dorado can place water for various periods of time.

Q And the first question is, how often in history has Folsom spilled?

MR. RENNING: A Folsom probably spills about 60 percent of the years, perhaps a bit more.

Q What factors would the Bureau consider in determining whether its interests would be impaired by storage of water for El Dorado in Folsom Reservoir?

MR. TURNER: I would repeat, Mr. Volker, in case you want to change the water storage to placement, or are you still talking about storage?

MR. VOLKER: Q We will break it down, placement for less than 30 days, and then I will ask a follow-up question of storage for more than 30 days.

A The principal item that we would look at would be whether our ability to serve water to our contractors would be affected and our ability to meet the requirements for other purposes such as in-stream flow purposes.

Q Have any of your contractors advised you that they believe their interests would be adversely affected should you permit El Dorado to place water in Folsom Reservoir?

A Yes.

Q Which ones?

A I believe Westlands Water District testified to this yesterday.

Q And any others?

A (The witness shook his head.)

Q Would you be obliged to notify all of the existing project contractors of any proposal by El Dorado County to place water in Folsom Reservoir?

MS. MOORE: A Any contract negotiations that we have regarding a contract in excess of one year are published and held in open forum for the public to attend and participate in.

Q What impact, if any, does the legislation creating the so-called Fazio water entitlement of approximately 15,000 acre-feet have on your ability to allow placement of El Dorado's water in Folsom without impairing the interests of the contractors?

MR. TURNER: I think that's a legal question, Mr. Stubchaer. What does the legislation say about it? If the legislation says it, they say it and they can't give legal opinions otherwise.

MR. VOLKER: I mean, as a practical matter, I don't know what the legislation -- I thought perhaps as the manager of the facility that we could --

MR. STUBCHAER: And not as a legal opinion.

MR. VOLKER: No.

MR. STUBCHAER: Just to the best of their knowledge, if they know.

MR. VOLKER: Yes.

MR. RENNING: A Essentially, what this will do is place an increased demand on the Central Valley Project and to some degree affect our ability to deliver water to all of our contractors under adverse hydrologic circumstances.

MR. VOLKER: Q At present, what is the relationship between existing contractual demands on Folsom Reservoir and its operational capacity?

A I truly don't know.

Q What I am getting at, and perhaps I didn't ask the question very well, do you have in mind approximately the water volume of existing contractual entitlements to water stored in Folsom?

A No, I don't have that information.

Q Is that the kind of information that an operational study would develop in order to ascertain whether you have excess capacity?

A I don't know if we would extract that sort of data, but presumably it could be done if somebody wanted to do that.

Q Do you know of any reasons why you might determine that you did not have excess capacity such to permit placement of water by El Dorado in Folsom Reservoir pursuant to the application before this Board?

A I am sorry, restate the question.

Q Do you know of any reasons why you might reject an application from El Dorado to place water in Folsom Reservoir pursuant to the application pending before this Board?

MR. TURNER: I think it's already been stated, Mr. Stubchaer, that negotiations to enter into such a contract have not been considered. It is not an issue that the

Bureau has addressed. He has asked for another statement and we don't know until we get into negotiations and find out what's being requested and what is available.

MR. STUBCHAER: Calls for speculation.

MR. TURNER: I'm afraid so.

MR. STUBCHAER: Sustained.

MR. VOLKER: I believe the question is proper. It asks the witness if he knows any reasons and he could say I don't or he can say I do, but to cut him off and prevent him from testifying is, I believe, improper.

MR. TAYLOR: State the question again, please.

MR. VOLKER: Do you know of any reasons why the Bureau might reject an application from El Dorado to place water in Folsom Reservoir pursuant to the application pending before this Board?

MR. TAYLOR: Can you answer that, Mr. Renning?

MR. RENNING: Let me answer it this way. I think the reasons are spelled out within the Warren Act, the criteria that we have to follow. I am not that familiar with it, but I think the Warren Act speaks for itself.

MR. VOLKER: Q The follow-up question would be, in view of the fact that there is a statute that sets forth the criteria, do you have information that suggests to you that there would be grounds for rejecting an application by El Dorado to place water in Folsom Reservoir pursuant to this application?

A I think that the grounds for rejection of such an application is going to be primarily based on the legal analysis of what is going on with respect to their application, and I don't feel competent to answer that question.

Q Thank you. Are you familiar with the environmental reviews presently under way with regard to allocation and distribution of the so-called 15,000 acre-feet of Fazio water for Folsom?

A I am not personally familiar with them. I just merely know that they are going on, that it's being done by another group of the Bureau.

Q Do you know which unit is doing it?

A The unit that has specific responsibility for the programmatic EIS in developing a water allocation policy.

Q Is that an entity within the Bureau of Reclamation?

A Yes.

Q Is there co-participation by any State agency in that process?

A I think it is a very broad public -- they have a very broad public participation process with respect to that effort.

Q Do you know the approximate time frame for completion of the EIS pursuant to that process?

A I believe it is to be completed sometime next year, 1996.

Q And do you know if there is any further approval of the process required following completion of that EIS before the Bureau could begin delivery to El Dorado of all or a portion of the 15,000 acre-feet of Fazio water?

A I do not know.

MR. VOLKER: I have no further questions.

MR. STUBCHAER: Thank you.

MR. SOMACH: Mr. Stubchaer, when the rest of the parties are finished with their cross-examination, I would request five minutes to be able to cross-examine these witnesses on the Warren Act direct testimony that was just provided from Mr. Volker's examination.

MR. STUBCHAER: Yes, you may use some of your time.

All right, we are going to take a 12-minute recess now.

MR. VOLKER: Mr. Stubchaer, we made at least two typographical mistakes in one of the exhibits submitted previously which we have caught, and hopefully they are the only ones, and also, during the testimony of PG&E representatives, statements were made with regard to compliance with FERC flow requirements at Kyburz that I think require some attention.

I have a table displaying the flows of the South Fork American River at Kyburz over the last approximately 50 years of record that I would like to have also marked as exhibits for the rebuttal testimony of Dr. Curry.

May I make those available at this time?

MR. STUBCHAER: We will mark them when you get to your rebuttal testimony.

As a courtesy to the others, if you want to distribute them, go ahead.

MR. VOLKER: Thank you.

MR. STUBCHAER: A 12-minute recess.

(Recess)

MR. STUBCHAER: Okay, the hearing will come back to order.

Mr. Birmingham, are you ready to proceed with your cross-examination?

MR. BIRMINGHAM: I am.

MR. STUBCHAER: We will reverse the order here.

CROSS-EXAMINATION

by MR. BIRMINGHAM:

Q My questions will be directed primarily at Mr. Renning.

Mr. Renning, if I were to presume that you were familiar with the term CVP yield, would I be correct in my presumption?

A Yes.

Q What does that term CVP yield mean?

A That's the quantity of water that the Central Valley Project can deliver to its contractors under adverse hydrologic circumstances.

Q What do you mean, hydrologic circumstances?

A During long-term droughts such as occurred during 1928 through '34, or the recent drought that we were in.

Q The yield is determined by looking at the amount of water that the project can produce during a critically dry period?

A Yes.

Q Now, included in the calculation of the Central Valley Project yield, or let me state the question differently. Is the 17,000 acre-feet which El Dorado now

seeks to appropriate included within the Central Valley Project yield?

A Yes, to the extent that the hydrologic records that are used in these studies do not assume that El Dorado is diverting that water, that water would be available at Folsom?

A Does the Bureau of Reclamation have contractual or regulatory obligations to provide water within the American River watershed?

A Yes, we do.

Q What are those obligations?

A We have a number of contracts with entities within Sacramento County, Placer County, El Dorado County.

Q And does the Bureau have minimum fish-flow obligations in the lower American River?

A Yes, we do.

Q Does the Bureau of Reclamation make releases from Folsom Reservoir in order to maintain the water quality standards in the Sacramento-San Joaquin Rivers Delta?

A Yes, we do.

Q Now, my last question focuses on a critical year. In a critical year, do the Bureau's in-basin contractual or regulatory obligations consume the entire amount of water that can be produced by Folsom Reservoir?

A I wouldn't characterize it as consuming the entire amount of water, but there would be circumstances under which the meeting of our in-basin demands, including the flow requirements to the lower American River and the Delta would control operations at Folsom Reservoir.

MR. BIRMINGHAM: I have no further questions. Thank you.

MR. STUBCHAER: Ms. Lennihan.

CROSS-EXAMINATION

by MS. LENNIHAN:

Q Mr. Renning, I am going to ask you some questions regarding Kirkwood Associates applications and petitions for partial assignment. Those applications and petitions seek a maximum annual diversion amount of 500 acre-feet.

Are you aware of that?

MR. RENNING: A Yes, I am.

Q And those applications also seek the water for snow-making use.

Are you also aware of that?

A Yes, I am.

Q Were you present during the earlier testimony of Kirkwood Associates?

A Yes, I was.

Q And you understand that the estimate is that less than 90 percent of the water which Kirkwood uses would be consumptively used; is that correct?

A I think it was less than four percent.

Q I'm sorry, I reversed it. Actually, it is six percent to be precise. You recognize that?

A Yes.

Q In reading through your testimony, and I am looking now at USBR 95-2 regarding the Kirkwood Associates and other applications, you stated that Reclamation recognizes that

the amount of water which would be consumptively used pursuant to all of the permits by the entities addressed in that testimony is insignificant in relation to the quantities of the American River water that Reclamation has appropriated.

Given Kirkwood's consumptive use for snow making is a maximum of 30 acre-feet per year and an average of 15 acre-feet per year, do you contend on behalf of the Bureau that Kirkwood water use will injure the Bureau water use in Folsom?

A I believe my testimony was that we recognize that the amount of water which will be consumptively used pursuant to the permits requested is insignificant, and that the issue that we are primarily concerned with in our protests is the legal issue associated with the granting of rights on reservoirs that have been in operation for many years with power rights.

Q Let me restate my question, and that is, does the Bureau take the position that Kirkwood's water use, and I mean only the water use for snow making, will injure the Bureau's water uses out of Folsom?

A As a practical matter, that use will not injure the Bureau or affect our rights; however, we would prefer to let our protest stand and let the Board address this issue as to whether such a right should be granted under the circumstances that exist surrounding Kirkwood's application.

Q What specifically about Kirkwood's applications does the Bureau object to?

MR. TURNER: I think that has been asked and answered. He has already stated it very clearly in his written and oral testimony.

MR. STUBCHAER: It is the principle.

MS. LENNIHAN: Well, I just want it clear on the record because we are not at this point able to understand what injury there is and Mr. Renning has just testified there is no injury.

Q Is that correct, Mr. Renning?

A Well, for your particular application, but if another entity applied in similar circumstances for a use that was not insignificant, that if it were for thousands and thousands of acre-feet that were going to be used in such a manner that it would significantly affect our rights, then we would have a concern with that.

Q But with regard to Kirkwood's application specifically it is your conclusion that they will not injure the Bureau's water use; is that correct?

A That's correct.

MS. LENNIHAN: Thank you.

MR. STUBCHAER: Mr. Gallery, I see your hand half up?

MR. GALLERY: Yes, I will get it clear up after this.

CROSS-EXAMINATION

by MR. GALLERY:

Q Just one question, Mr. Renning.

You testified here, Mr. Renning, that you question the authority of the Board to grant permits to Alpine County and Amador County for nonconsumptive uses when applied for recreational use.

You don't question the authority of the Board to apply for a permit for recreational use; do you?

A No, I don't believe so.

Q And the Bureau itself in its water rights at Folsom, there are rights to use the water for recreational purposes; isn't that correct?

A Yes.

Q And are you familiar with the SMUD permits for the upper American River reservoirs, Loon Lake and Union Valley?

A No, I am not familiar with those.

MR. GALLERY: That's all I have.

MR. STUBCHAER: Thank you.

Let's see, Mr. Somach, I believe you had about ten minutes?

MR. SOMACH: I have read the transcript from the prior hearing on this matter and I am anxious to make sure that these hearings conclude today, and I don't want to do anything that will prolong them, so as a consequence, I will rely upon the direct testimony and cross-examination on the Warren Act points that were made in our prior hearing.

MR. STUBCHAER: All right. Staff?

E X A M I N A T I O N

by MR. LAVENDA:

Q Just a couple of questions.

Mr. Renning, do you have knowledge of what one acre-foot of water might be worth to the Bureau in terms of power generation at Folsom?

MR. RENNING: A No, I don't have that figure off the top of my head. I am sorry, I don't have that figure. I don't know.

Q And if you did have such a number, would it include power both at Folsom and at Nimbus?

A Yes, it would.

Q Assuming that water passes through Folsom and also passes through Nimbus and generates hydropower?

A Yes, it would.

Q In your testimony in regard to El Dorado applications, which is USBR 95-1, you mention a number of contractors for Folsom water.

Is SMUD a contractor for Folsom Reservoir water?

A Yes, it is.

Q And do you know if that water is used in any way, shape or form for recreation at SMUD facilities?

A I believe that the water that they take now is primarily used to keep Lake Rancho Seco full and that's for recreation.

Q Are there currently any other uses made of that water body?

A Lake Rancho Seco? There may be some uses associated with the maintenance operation of the powerplant, but I truly don't know.

Q Is primarily contract water supplied for recreation, though?

A Yes.

Q In your testimony in regard to Kirkwood Associates and Alpine and Amador Counties, you raised the question, Reclamation questions the authority of the Board to grant

permits for the storage of water for nonconsumptive uses specified in those applications.

Is reclamation a specified use at Sly Park?

A I don't know. It probably is, but --

Q I see some shaking heads against the far wall.

A If it is not, I certainly stand corrected but I am not personally familiar with those permits, and I guess I should say I don't know.

Q And you mention at Folsom there is recreation included as a use; is that correct?

A I believe so, yes.

Q Is there a minimum pool requirement at Folsom?

A Not that I am aware of.

Q What is the lowest level Folsom has ever been drawn down to?

A I believe in 1977, it was drawn down to a little below 200,000 acre-feet.

MR. LAVENDA: Thank you. No further questions.

MR. STUBCHAER: Any redirect, Mr. Turner?

MR. TURNER: Yes, just a few quick questions.

REDIRECT EXAMINATION

by MR. TURNER:

Q I think you had mentioned in your earlier testimony, Mr. Renning, that you were concerned that in the future there would be demands in excess of supply at Folsom. I think you had mentioned that that was going to be affecting both in-basin and export uses of water; correct? Would you explain that in a little more detail?

A Yes. With respect to export demands, our ability to meet those demands can be affected in two ways; by increased use in the upper American River watershed -- first, it could affect the Central Valley Project's ability to meet export demands when Folsom is clearly supporting such demands, but that may be an impact that the area of origin principles allow to happen.

And second, it could affect Folsom's ability to meet such demands when Folsom's operations are being dictated by in-basin deliveries and/or by flow requirements for the lower American River and the Delta, because to the extent that Folsom storage must be committed to meeting those demands, it is going to affect our ability to meet our export demands at a later period, and for that matter, our in-basin demands at a later period in time.

Q Now, I believe that in the protest that the Bureau had filed, there was a reference to the Bureau's willingness to consider withdrawing the protest if one of the conditions that was agreed to was Term '91. I wonder if you would explain how that would have any applicability to these particular applications.

A Well, Term '91 conditions exist when the storage releases of the CVP and the State Water Project exceed the quantities of water that are being exported by the two projects in the Delta. That means that the storage releases are being used to meet in-basin demands collectively by the project.

The conditions that I have been talking about with respect to the American River and Folsom Reservoir are

specific to Folsom Reservoir. There may be conditions where our operations are constrained by in-basin demands solely at Folsom and the project as a whole may not necessarily be under Term '91 conditions.

Q Is it not the case that Folsom Reservoir is operated for numerous purposes including the meeting of fish flows, meeting Delta water quality flows, meeting contract demands? Aren't those elements of Folsom operation?

A Yes, they are.

Q And I asked in connection with the questions that Mr. Volker was asking as to what are the contract demands on Folsom and how is that going to be affecting their particular operation in connection with the El Dorado applications?

It's not just contract demands alone that need to be considered when we are looking at the operation of Folsom; correct?

A Yes, that's right. Certainly, with respect to actions that are taking place with respect to the CVPIA, I think it is almost a given that flows for fishery purposes are going to increase from the CVP reservoirs.

MR. TURNER: I wouldn't have anything further.

MR. STUBCHAER: Anyone wish to recross on these questions?

Mr. Volker. These are limited strictly to the issues just addressed on redirect.

REXCROSS-EXAMINATION

by MR. VOLKER:

Q Mr. Renning, I believe you just testified to the breadth of the constraints on the Board's ability to enter into arrangements for the placement of water in Folsom by others.

I want to ask you whether --

A I wouldn't characterize my testimony as that.

MR. TURNER: Could you clarify, Mr. Volker? You said you are talking about the Board's authority to place water in Folsom.

MR. VOLKER: The Bureau's authority -- I'm sorry. Let me rephrase.

Q Is the Bureau constrained by the EPA water quality standards adopted December 14, 1994, with respect to minimum flows in the Bay-Delta system?

MR. TURNER: I would take exception to the word constrained. I think if you are asking are those particular standards being implemented by the Bureau, that might be an appropriate question that could be answered.

MR. VOLKER: All right.

A Well, the exact standards that we are operating to now are the standards adopted by the Board in May of this year which are very similar to the standards that were contained in the December agreement.

MR. VOLKER: Q Do you agree that implementation of those standards requires enhanced releases of fresh water from Folsom to the Delta?

A Well, perhaps not specifically from Folsom, but they require increased flows into the Delta from the Sacramento River, yes.

Q Has the Board yet determined how it will meet those Board-adopted Bay-Delta water quality standards?

A Well, we are meeting them now.

Q In dry years?

A Well, meeting those standards in dry years is probably going to require that the deficiencies be imposed on our contractors over what they might otherwise have had placed on them absent those standards.

Q What changes in operation, if any, has the Bureau adopted to assure conformance with the State Water Board's Bay-Delta standards?

MR. SOMACH: Objection. Now we are talking about compliance with Delta standards. We are so far afield of what this hearing is about, I object as to relevance.

MR. STUBCHAER: Sustained.

MR. VOLKER: I believe the witness testified that among its constraints on its ability to approve additional placement of water in Folsom Reservoir is its statutory duty to comply with the Clean Water Act and Bay-Delta standards, and my question asks him simply what measures the Bureau was undertaking to assure compliance with those standards.

MR. TURNER: Mr. Stubchaer, the problem we have is, first of all, as Mr. Renning has pointed out on numerous occasions, what we are talking about here is the operation of Folsom Reservoir, which is one facility of the Central Valley Project.

As we pointed out in the 1993 hearings, Folsom Reservoir is operated in conjunction with Shasta and Trinity for water quality releases to the Delta, and that we cannot, in fact, sit down and identify that Folsom will do X, Shasta will do Y, and Trinity will do Z to meet the new Bay-Delta standards compared to what they would have done before.

It's integrated and been modified and changed at any point in time, so I don't know how Mr. Renning can give an answer to that question.

MR. VOLKER: Mr. Renning is apparently qualified to give such an answer if that is his testimony. I think the question is proper.

MR. SOMACH: I still have an objection to the question. I thought it had been sustained.

MR. STUBCHAER: Yes, I did sustain it.

Mr. Turner just amplified why it can't be answered if it is not sustained.

MR. VOLKER: I think Mr. Turner was testifying for the witness. That is improper. I don't think his testimony should be permitted and I move to strike it as interrupting the rights of protestants to put a proper question to the witness.

MR. TURNER: Mr. Stubchaer, I was not testifying. I was repeating what was stated in the previous hearings held on this particular matter, and I can go ahead and pull the transcript and we can read it directly where that was testified to. It is not new information.

MR. VOLKER: Of course, the Bay-Delta standards were not in place in 1993. It is a proper question and I am going to insist I have an answer to it.

MR. SOMACH: I objected to the question separate from

Mr. Turner, and Mr. Stubchaer has sustained my objection.

MR. STUBCHAER: Yes.

MR. VOLKER: I will move on then, Mr. Stubchaer.

Q Has the Bureau ever undertaken to ascertain its obligations under Article X-A, Section 3 of the California Constitution?

MR. TURNER: That's asking for a legal conclusion and I object.

MR. STUBCHAER: Can you relate that to the redirect testimony?

MR. VOLKER: Yes. The redirect testimony had to do with the obligations of the Bureau to satisfy environmental constraints in determining what water to accept for placement in Folsom. Article X-A, Section 3 of the California Constitution is one of those environmental constraints, and I would be happy to read it to the witness, if he is unfamiliar with it.

MR. SOMACH: I object to the mischaracterization of Mr. Renning's testimony, which he has already corrected you on once. He has repeated the mischaracterization.

MR. STUBCHAER: I am going to sustain the objection on the grounds it calls for a legal conclusion.

MR. VOLKER: Q Do you have any information with regard to whether or not the Bureau is under any constraints foreclosing diversion or redirection of water from the South Fork American River at Folsom Reservoir for export to the Cosumnes River watershed?

A I don't quite understand your question.

Q Have you ever received any direction from anyone at the Bureau with regard to whether the Bureau is constrained by features of the California Wild and Scenic Rivers Act with regard to applications for export of water from Folsom to the Cosumnes River watershed?

MR. SOMACH: Objection, relevance, beyond the redirect.

MR. BIRMINGHAM: Shortness of time.

MR. STUBCHAER: I don't know where in the redirect they mentioned something that is related to that question.

MR. VOLKER: Well, it was my understanding that the redirect addressed environmental constraints on the Bureau's acceptance of water in Folsom and I am simply exploring the parameters of that.

A All I can say is that the Bureau will meet the flow requirements that we have obligations for in the lower American River and I don't know what else I can say about it.

MR. VOLKER: Q You are not familiar with any specific constraints on your operation that flow from the California Wild and Scenic Rivers Act?

A I am not familiar with any.

MR. VOLKER: I have no further questions.

MR. STUBCHAER: Anyone else?

E X A M I N A T I O N

by MR. LAVENDA:

Q One brief question. Mr. Turner, you mentioned a number of conditions that the Bureau must consider in the operation of Folsom, and for the record, I did not hear

recreation.

My question is, is recreation considered by the Bureau in its day-to-day operations or season-to-season operations.

MR. TURNER: I presume that question was directed to Mr. Renning. You mentioned Mr. Turner.

Q Mr. Renning, yes.

A Yes, in the annual operations of Folsom Reservoir we attempt to maintain the level of Folsom such that the marina is in operation throughout the entire year and that the various boat ramps are in the water and that sort of thing.

Q You say throughout the entire year. Is there a specific season?

A I am sorry, through the recreation season, primarily between Memorial Day and Labor Day.

Q And would you characterize Folsom as a high-use recreational water body?

A Yes, that's my understanding.

Q And in which county is this reservoir located?

A It's located in three counties, Placer, El Dorado and Sacramento.

Q And do you have any idea of the percentage of distribution?

A No, I don't.

MR. LAVENDA: Thank you.

MR. STUBCHAER: Okay.

MR. TURNER: Mr. Stubchaer, I would like to introduce and have accepted for the record the Bureau of Reclamation's Exhibits 95-1 and 95-2.

MR. STUBCHAER: Without objection, they are accepted.

Mr. Turner, thank you for your appearance.

Mr. Baiocchi, did you wish to make a policy statement?

MR. BAIOCCHI: No.

MR. STUBCHAER: Mr. Infusino, it is my understanding you wish to make a policy statement and then introduce some exhibits for consideration for acceptance into the record; is that correct?

MR. INFUSINO: Yes, I have an opening statement and then I will attempt to introduce some evidence.

MR. STUBCHAER: All right. Just for the benefit of the audience, you do not plan on calling any witnesses?

MR. INFUSINO: That is correct.

As you know, I represent Quality Growth. Quality Growth is here to present some evidence relevant to the State Water Board's consideration of the El Dorado application. Much of this evidence has come into being since the June, 1993, hearing on the previous versions of the El Dorado project, and is, therefore, very relevant to the focus of this hearing.

Quality Growth hopes to introduce evidence from El Dorado County's own records to show that El Dorado County is planning to significantly impact the land, air, wildlife and waters of the State of California. The evidence would show that El Dorado County is planning not to meet health-based State ambient air quality standard. The evidence would show that El Dorado County is planning to create gridlock on

Highway 50.

The question before the State Water Board is, can El Dorado County with such plans in mind send its Water Agency to the State Water Resources Control Board and be handed the water needed to execute those plans?

In response to the notice of the revised El Dorado project applications on September 13, 1994, Quality Growth filed with the State Water Board a protest form with an attached statement of reasons, statement of facts, proposed mitigation conditions and exhibits.

I will try to now briefly summarize that 50-plus page statement on the grounds of Quality Growth's protest.

As you know, a protest of an application can be based upon an allegation that the proposed appropriation would not best conserve the public interest or public trust uses, would have an adverse environmental impact or be contrary to the law, Title 23, California Administrative Code, Section 745(c).

Quality Growth basically makes five allegations that suggest that El Dorado's applications do not best conserve the public interest or public trust uses, would have adverse environmental impacts and would be contrary to law.

First, Quality Growth alleges, as do other protestants, that the El Dorado project would take water needed for recreation, fish, wildlife and other public trust values.

Second, Quality Growth alleges that the proposed appropriation is in an amount in excess of that reasonably necessary for County development. The California Constitution acknowledges the importance of water by precluding its waste and unreasonable use (Article X, Section 2.) this prohibition against waste and unreasonable use is echoed in Water Code 275.

Even if water will be put to an acknowledged beneficial use such as domestic or agricultural use, the amount of water that can be appropriated and the manner in which it can be appropriated is limited to the amount that is reasonably necessary for that use.

With respect to statutory provisions protecting the areas of origin of water from water exporters, even these statutes reserved for these areas only the water reasonably required to adequately supply the beneficial needs of the protected area and the water necessary for the development of the County, Water Code Sections 1216, 10,505 and 10,505.5.

Quality Growth hopes to introduce evidence to show that the proposed appropriation is in an amount in excess of that reasonably necessary for County development.

The evidence would show natural and other resource constraints will restrict growth to levels that can be effectively supplied by El Dorado's other sources of water supply, thereby eliminating the need for the water requested in El Dorado's applications.

Third, Quality Growth alleges that the appropriation would damage valuable natural resources, a constitutional mandate against waste and unreasonable use; also, forbids a disposition of water that would entail not only waste of

water but damage to valuable natural resources (Natural Products Company vs. City of L.A., 1943, 23 Cal 2nd 193).

Quality Growth hopes to introduce evidence that the El Dorado project may result in damage to valuable natural resources in the use of that water. The evidence would show that the style and amount of residential growth to be serviced by the El Dorado project may waste land, air, water and wildlife resources of the State of California.

Fourth, Quality Growth alleges that it is not in the public interest to grant further appropriative water rights to an applicant that continues to violate affluent discharge requirements. In determining the public interest, the Board shall give consideration to any general or coordinated plan looking toward control, protection, development, utilization and conservation of the water resources of the State, Water Code Section 1256.

Quality Growth hopes to introduce evidence, some from the State Board's own files, that indicate that El Dorado Irrigation District continues to fail to meet effluent discharge requirements in its operating permit of the Deer Creek wastewater treatment plant.

Fifth, Quality Growth alleges that the amount and style of development supplied by the water will create in El Dorado County an unsuitable living environment. In acting upon applications to appropriate water, the Board shall consider the State goal of providing a decent home and suitable living environment for every Californian, Water Code Section 1259.

Quality Growth hopes to introduce evidence that the amount and style of growth accommodated by the appropriated water would exacerbate existing substandard living conditions in the County and would hamper efforts to remedy these substandard conditions.

In addition, the cost of financing the growth and associated infrastructure may make living in El Dorado County cost prohibitive for some Californians.

With that, I would like to begin the introduction of evidence. If I can propose a method for doing that, I would suggest that I be allowed to identify items from our exhibit list so we understand the number we are dealing with, make a brief statement explaining why it is relevant and why it is admissible, and then field any objections that may come forth.

MR. STUBCHAER: That sounds reasonable, but I will say before we begin, subject to correction by Mr. Taylor, that documents which are already in the record or in the State Board's files can be referred to. However, copies from publications for which the author is not available for cross-examination, such as a newspaper article, I'm inclined to not admit.

MR. SOMACH: Mr. Stubchaer, I want to renew my objection. The point is there is nobody available for cross-examination on any of these exhibits because there is nobody testifying in support of these exhibits. That is no fault of the project proponents here. That is entirely the fault of the protestant.

My suggestion to the extent there is -- I don't want

to drag this on and I think it is important for us to proceed -- is that to the extent that a policy statement has been made, that if he wants to attach this as a part of the policy statement, there is no proper objection, I guess, to that in one sense, and that's the only way one gets around the fact that otherwise it can't come in because there is no ability to cross-examine on it.

They cannot be in a technical sense evidence or exhibits. They can be simply part of an envelope of his policy statement.

MR. INFUSINO: Mr. Stubchaer, if Mr. Somach would like to present rebuttal evidence following my presentation, he is open to provide that rebuttal evidence. If he would like to bring in people to question the veracity of the documents or the people to question the accuracy of the documents, he is welcome to do that. He has ample opportunity to counter this evidence if he so chooses.

The documents speak for themselves. If he wants to attack information in the documents, he is free to do that the same way we were free to attack information that was in any of his documents.

MR. STUBCHAER: Under our proceedings, the authors of the documents should be present for cross-examination. They, in fact, wrote them and that doesn't apply to many of these exhibits.

I think Mr. Somach raises an interesting possibility where you could get your documents on the record and that is attach them to your policy statement, but they would not be formal exhibits accepted as evidence. They would back up your policy statement, and you can refer to them in your policy statement and that would save a lot of time.

MR. INFUSINO: If I thought the decision of this Board would be the end of the proceedings on this matter, I would be inclined to do that, but it is my guess that this is going far beyond the decision of the Board and I think it is critical that this evidence be in the administrative record formally.

According to the Rules of Evidence that are followed under this proceeding, this is Title 23, Section 761(d), any relevant nonrepetitive evidence shall be admitted if it is the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. It says the hearing need not be conducted according to the technical rules of evidence relating to evidence and witnesses. However, it doesn't preclude you from complying with those rules, and my suggestion is we see if I can comply with some of those rules.

After all, those are the rules relied upon by courts throughout this land. Those are the rules used to decide cases that involve millions of dollars of damages, cases that involve the restraint of people's personal freedom, and in some cases, their loss of life.

I mean, if I can manage with some of my exhibits to meet some of the requirements of the Rules of Evidence, I feel like I have met your reliability requirements. I may be able to calm some of the concerns. I have attempted to hone down the pile of evidence to approximately nine

exhibits, and if I can have the opportunity to try to admit those nine exhibits, I would appreciate it.

MR. STUBCHAER: Yes. Before you start, it looked like Mr. Taylor wanted to say something. Okay.

MR. INFUSINO: Quality Growth's first exhibit in order is the water supply and demand summary of El Dorado County Agency, dated 5/17/95. It is relevant --

MR. STUBCHAER: Please give us the number.

MR. INFUSINO: It was identified in our exhibit list as Exhibit No. 4.

MR. STUBCHAER: It says 4 is by reference.

MR. INFUSINO: Correct. It is relevant evidence that the applications in question are in excess of a reasonable need as alleged in Quality Growth's protest. I have a copy here that is authenticated.

MR. STUBCHAER: This wasn't distributed with your packet of exhibits.

MR. INFUSINO: No, this was on file. The procedure, as I understand it, is when documents are to be incorporated by reference, a copy has to be on file with the Board, and that relieves you of the burden of providing copies to the other parties. It was noted as such on our list of exhibits and was on file with the Board on October 2.

If you look at our list of exhibits, you will see a small r.

MR. STUBCHAER: That stands for reference. I have it, go ahead.

MR. INFUSINO: This document is authenticated, signed by the Deputy Clerk of the Board of Supervisors of El Dorado County on paper embossed with the seal of the County of El Dorado. It complies with the Best Evidence Rule and there is a copy of the document on file with a public entity in the United States, Evidence Code Section 1530. It conforms to the hearsay exception, Evidence Code Section 1280 for records of public agencies in that --

MR. SOMACH: Is there some way we can go through these nine? I am very afraid we are not going to get done if this drags on for nine documents.

My objection is going to be the same. We have certain due-process rights that are going to be trampled by having evidence entered into the record that is not subject to cross-examination due to nothing that we caused, nothing that we did.

I have offered a suggestion that would allow him to get whatever it is he wants before the Board in terms of a policy statement, but there is no cure in terms of citing the Evidence Code hearsay rules or other kinds of rules that they are just additional objections I could heap upon the fundamental objection, and that is there is no witness here competent to be cross-examined on any of the substance of any of the documents that are being offered.

MR. STUBCHAER: Let's identify the exhibits before we discuss each in detail. Could you do that, and we could use your exhibit number list.

MR. INFUSINO: That's what I am trying to do.

MR. STUBCHAER: I mean before we get into the discussion.

MR. INFUSINO: I want to make sure I give you an accurate list.

No. 4, which I was just speaking to;

No. 25, Fiscal and Financial Feasibility Analysis of Draft General Plan, 2015 Draft Report, County of El Dorado, October 21, 1994;

Exhibit Nos. 26 and 27, which are NPDES Reports from Deer Creek Wastewater Treatment Plant in May of 1995 and June of 1995;

Exhibit No. 29, Investigation of Allegations of Improper Operation and Maintenance Resulting in Violations of Waste Discharge Requirements at Deer Creek Wastewater Treatment Plant, El Dorado Irrigation District Clean Water Grant No. C-06-1014-110.

MR. STUBCHAER: That's not in the package you delivered.

MR. INFUSINO: It was a document to be incorporated by reference. A copy was on file with staff on October 2.

MR. TAYLOR: I didn't get the last reference.

MR. INFUSINO: Exhibit No. 29. It was noticed for purposes of identification.

MR. STUBCHAER: And then, what was your next number?

MR. INFUSINO: No. 32, Technical Assessment of the Conceptual Land-Use Plan, El Dorado County Plan, 1020 General Plan.

Exhibit No. 34 --

MR. STUBCHAER: Just a moment. All right.

MR. INFUSINO: Exhibit No. 34, El Dorado County General Plan Update Draft EIR, December, 1994.

Beyond Sprawl, New Patterns of Growth to Fit the New California, Exhibit No. 35, a product of the Resources Agency.

MR. STUBCHAER: It is a title, not a sentence?

MR. INFUSINO: And Exhibit 36, Linkage Between Land Use and Air Quality.

MR. STUBCHAER: Does that conclude the list?

MR. INFUSINO: That concludes the list.

MR. STUBCHAER: Mr. Taylor or staff, are all these documents on file with the Board?

MR. LAVENDA: Yes, sir.

MR. STUBCHAER: Mr. Taylor.

MR. TAYLOR: I have several comments.

First of all, notwithstanding the fact that a proposed document may be hearsay, it may, nevertheless, be admissible if it would be admissible in a court of law. Our regulations provide that the Board may take official notice of certain kinds of documents. That one takes official notice merely means we can take notice of the existence of those documents and what they say.

That doesn't necessarily follow that the facts stated in those documents may be treated as facts by the Board in making a decision.

With regard to publications of State agencies here, it is my view that the Board may take official notice that those documents have been prepared and published by State agencies, that they exist and what they say.

So, I think to that extent, we can take official

notice of some of these documents. I have serious reservations about taking official notice of the draft documents which haven't been filed supporting any kind of a fact as offered by Mr. Infusino.

MR. INFUSINO: It appears to me we really need to go through these one at a time because otherwise we are going to get these sort of vague objections about which one is draft, which one is final.

MR. STUBCHAER: Well, I would like to see if there are some here we can agree that we will take official notice of, do it in steps.

Exhibit 25 also is a draft.

MR. TAYLOR: Let me go through these that I have noted that it appears we could take official notice of: No. 29, because that is a document within the Board's records which was prepared by Board personnel; and it appears No. 32, No. 36.

MR. STUBCHAER: Did you skip 34 because it was a draft?

MR. TAYLOR: Yes.

MR. INFUSINO: Would you like us to start there?

MR. STUBCHAER: I will get to you. You will have your chance.

MR. INFUSINO: It's still a long four days.

MR. STUBCHAER: You have earned your time by patiently waiting.

No. 4 also said draft. I wanted to identify that. And 25 is a draft. No. 26, I don't see any; 27 -- well, we can narrow the list down by four anyway and I will say that I am inclined to take official notice of the documents, 29, 32, 35 and 36.

MR. SOMACH: Don't I get to --

MR. INFUSINO: I'm sure you do.

MR. STUBCHAER: I haven't made a ruling. I said my inclination was to accept those.

MR. SOMACH: Your are not going to accept those into the record, you are going to take official notice of them, which I think is different and that ought to be made very clear for the record, that they are not introduced into evidence, but you will take notice of them.

Moreover, I want to add in addition to the objection which I made earlier on the record, so I am not going to restate my objection, but that these documents she is now asking you to take notice of are also irrelevant and, in fact, the Board has previously made statements and has excluded other evidence which covers the exact type of information that's contained in many of these documents.

To the extent that we are talking about documents that deal with allegations and information about the facilities that are not before the Board in these proceedings, to the extent they were dealing with general planning documents, some of these are in the process of being prepared, if he has got a problem about the way El Dorado operates its wastewater treatment plant, he may enter into those hearings.

If he has a problem with the general planning process, he may enter into that process, and if he doesn't

like the Board's determination, the Board of Supervisors' determination, he may proceed to attack both of those determinations in a courtroom.

He may not collaterally attack those decision-making processes here when these matters are not before the Board.

That is the substance of my objection with respect to even taking notice of documents which are entirely outside of these proceedings.

MR. INFUSINO: Mr. Stubchaer, in my opening statement I thought I made it very clear why this evidence is relevant. I provided citations to legal authority why this information is important for this Board's consideration.

I refuse to respond to any more objections. They are not specific to a particular piece of evidence.

If we are going to get through these nine, we need to deal with them one at a time so I can field objections that aren't vague and unspecified.

One more point of clarification, Title 23, Section 761(f) describes evidence by reference. It says, may in the discretion of the Board be received into evidence as exhibits by reference.

Is it your holding regarding these four that reference will be taken, but they will not be received into evidence?

MR. STUBCHAER: My inclination is to take official notice of them but not accept them as evidence in this proceeding.

MR. INFUSINO: I just want to clarify that for the record.

MR. STUBCHAER: All right, begin with 4. You started with 4 but I have forgotten --

MR. INFUSINO: As I recall, we were somewhere around Evidence Code Section 1280, which deals with hearsay exceptions for records of public agencies in that it is a record offered to prove conditions regarding the project for projected development and water supply. The writing was made by the County Water Agency. It is within the scope of the authority and duty under the water initiative adopted by El Dorado County Board of Supervisors.

The writing is dated on the same date as the workshop during which it was used and the sources for that data included reliable sources such as the applicant, El Dorado Irrigation District.

It has been identified as Exhibit 4.

Finally, these papers were prepared by a public agency and are in the possession of the Board. It is within the scope of this hearing. Since it is new information, it could not have been brought up in the 1993 hearings since it did not exist.

Therefore, I move at this time this exhibit be received into evidence by reference.

MR. STUBCHAER: Because it is a draft and not a final, I am not going to accept it into evidence.

MR. TAYLOR: May I amend that slightly?

MR. STUBCHAER: Yes.

MR. TAYLOR: Mr. Stubchaer, you have discretion whether you wish to accept such a matter into evidence, and

it seems to me as a staff person that it is not prudent or responsible, nor should responsible people rely on draft documents as a basis for evidentiary findings in a proceeding of this sort.

For that reason, I agree with your opinion.

MR. STUBCHAER: Especially since the authors are not available for cross-examination.

All right, let's go on to the next one, 26.

MR. TAYLOR: Twenty-five, I believe.

MR. STUBCHAER: Twenty-five.

MR. INFUSINO: Which is the Fiscal and Financial Feasibility Analysis of the Draft General Plan dated October, 1994, which is relevant evidence, and that it goes to the amount of water requested by El Dorado's application, and that it is in excess of what is reasonably needed for County development, which is, of course, a condition of providing water to the area of origin.

Under Evidence Code 644, it bears the presumption of authentication as a book purporting to be published by a public entity. The final version was bound.

Under Evidence Code it is acceptable despite the best evidence rule since it is a document filed with a public entity. It is reliable in that it was prepared by the same consultant that the applicant has used and it is relying on for its projections of growth, and that firm produced an expert that testified in this hearing in June of 1993 regarding those projections on El Dorado's applications.

MR. STUBCHAER: The difference here is then the author was here for cross-examination.

MR. INFUSINO: I acknowledge that. I was trying to verify the reliability of the source of information. It is within the scope of this hearing. Since it is new information, it could not have been produced in the June, 1993, hearings.

Finally, it was prepared by a public agency and is in the possession of the Board, therefore, I move this exhibit be received into evidence by reference.

MR. TAYLOR: I am confused. We are talking about No. 25?

MR. INFUSINO: Yes.

MR. TAYLOR: Which is titled Draft General Plan --

MR. INFUSINO: No, it is a financial and feasibility analysis.

MR. TAYLOR: Okay.

MR. SOMACH: It's a draft analysis of a draft.

MR. STUBCHAER: For the reasons previously stated, I will not accept this exhibit into evidence.

Next is 26.

MR. INFUSINO: We can probably deal with 26 and 27 together.

MR. STUBCHAER: All right.

MR. TAYLOR: It is not clear to me who prepared Exhibits 26 and 27.

MR. INFUSINO: These NPDES reports?

MR. TAYLOR: Yes.

MR. INFUSINO: I have a copy that is verified by EID and the person who prepared it, if you would like to --

MR. TAYLOR: The question I have, are these reports prepared by El Dorado Irrigation District?

MR. INFUSINO: Correct. Exhibits 26 and 27 are NPDES reports on the Deer Creek wastewater treatment plant for May, 1995, and June, 1995, respectively. They are authenticated by a certificate of authenticity signed by Marjorie Lopez, an EID employee.

If you need copies, I have them here and we will see how we go.

They are relevant to show that through water allocation EID may cause more wasteful pollution of the water of the United States, impair beneficial uses of receiving waters, cause unreasonable damage to natural resources. That is not in the public interest.

Regarding the best evidence rule, it complies with Section 1530 of the Evidence Code, that it is on file with a public entity in the United States, certified to that effect.

It is reliable since it was prepared by the applicants for the purpose of monitoring compliance permit conditions.

It is within the scope of this hearing since it is evidence that could not have been produced during the June, 1993, hearings. Therefore, I move that this evidence be accepted by reference.

MR. STUBCHAER: Mr. Taylor.

MR. TAYLOR: I would like to hear from Mr. Somach on this one.

MR. SOMACH: In the first instance, I object with respect to relevance; secondly, I note that these are two reports, May, 1995, report and a June, 1995, report. These are the standard reports that go to the Regional Water Quality Control Board. There are literally decades of reports and I contend that in terms of, particularly the way this is coming in without any ability to cross-examine anybody with respect to these things, that unless all of the decades of reports are going to be put into evidence, that the selected portions without any idea or ability to cross-examine whoever it is that is putting them on, is inappropriate; so, on both grounds, relevance and the fact they are taken, in essence, out of context of decades of reporting.

MR. INFUSINO: First, let's deal with the issue of cross-examination. If Mr. Somach would like to recall one of his witnesses, Mr. Alcott is still here and other representatives from El Dorado Irrigation District are still here, and if he would like to cross-examination them, I have no objection to that. I don't know if we have time, but I have no objection regarding the context of this matter.

This evidence was in our exhibit list. If he wanted to provide rebuttal evidence from future months or past months, he was capable of doing that.

I realize there is a substantial burden associated with Mr. Somach's defending of this application. There are some 33 protestants he has to deal with. If he finds that burdensome, I have a remedy. He can withdraw his application.

Regarding the relevance of this, and we have been through this before, I think, we need to get back to common sense and my offer of proof is going to be in the form of a brief story, if it is okay.

I have a friend. His name is Hank and he used to own income property, and when he would rent his rental units out, he would always make sure he walked the prospective renter back to his car after he saw the apartment. Do you know why? Because Hank wanted to make sure that the property was maintained well and was tidy, and it was Hank's observation that if someone's car was full of yesterday's newspaper, and used Kleenex and a couple of beer cans, and whatever, and if their car wasn't tidy, they probably weren't going to be tidy tenants.

What we are suggesting is that the same is true for agencies and that when you look at the EID's house right now, it is not clean, and we are reluctant and we feel the Board should be reluctant to entrust to that house any further amount of our precious natural resources, and that those precious natural resources, both the resources allocated in their receiving water would be at risk. That is why we think it is relevant.

MR. STUBCHAER: Are these two documents in the Board's files?

MR. LAVENDA: Yes, they are.

MR. TAYLOR: Mr. Stubchaer, you have discretion on whether to accept this or not.

MR. STUBCHAER: Frankly, Mr. Infusino, I have a relevance problem. They are in our files. We could take notice of them but I don't see the relevance in spite of your story.

You told a similar story the other day and I think I will not accept them on the grounds of relevance.

MR. INFUSINO: We are to proceed then to 29?

MR. TAYLOR: Twenty-nine is one I have indicated the Board could take official notice of.

MR. STUBCHAER: So, let's go to 34.

MR. SOMACH: Again, with the understanding of what notice is and that it is not introduced as evidence. I would note that El Dorado disputes the contents of this document.

MR. INFUSINO: For the record, that was as to 29?

MR. STUBCHAER: I think it was 34, 35 and 36.

MR. SOMACH: That was 29.

MR. STUBCHAER: Did you have similar comments on 32, 35 and 36?

MR. SOMACH: My comments on those documents, at least through 34, 32 and 34 -- 34 is a draft document.

MR. STUBCHAER: Right. Your objection on 29 is noted.

MR. SOMACH: Since it was not accepted into evidence, you only indicated you would take notice of it, I wanted to make sure that as you took notice of it, you took notice of the fact that we don't agree with what is in there, and since no one is here to cross-examine, I can't do anything more at this point.

MR. STUBCHAER: It is on the record.

MR. TAYLOR: And I assume that it applies to 29, 32, 35 and 36, Mr. Somach?

MR. SOMACH: Well, 32 is a technical assessment of the conceptual land-use plan of El Dorado County to 2010 general plan, and my comment there is that it is not relevant again. It goes to the general planning process.

MR. INFUSINO: Can we do these one at a time?

MR. SOMACH: We are on 32; right?

MR. INFUSINO: I was directed to go to 34 since it is one that there has been an inclination of acceptance by reference.

MR. STUBCHAER: All right, please go to 34.

MR. INFUSINO: Exhibit 34 is the El Dorado County General Plant Update Draft EIR.

MR. STUBCHAER: And because this is a draft, I am going to not accept it in evidence or take notice of it for the reasons previously stated.

MR. INFUSINO: And I would like to respond to that as we go through here. It is relevant, first, to provide detail on the secondary impacts of the water project. It is relevant to explain the statement in the applicants' final supplemental EIR on page ES-4 where it says: The secondary impacts and mitigation measures are evaluated in detail in the Draft EIR on the El Dorado County General Plan. It was all incorporated by reference into their document.

In addition, it falls within the scope of this hearing because it goes to explain some of the changes that were made between the Draft Supplemental EIR of the applicant and the Final Supplemental EIR of the applicant.

It is relevant further because that explanation I referred to, the explanation of the secondary impacts is dramatic. For example, the applicant points in its findings that there are seven secondary impacts that are significant and unavoidable, whereas, the Draft Environmental Impact Statement I would like to offer suggested that there are two dozen significant unavoidable impacts associated with the growth supplied by this development, by this application.

MR. STUBCHAER: All right. The fact that the final EIR does reference the Draft EIR is a point you have made with me, and I would like to hear Mr. Somach's response to that because we are talking about 34.

MR. SOMACH: My objection in the first instance, and I don't want this to get lost, is that there is no one here that is introducing this evidence except for someone who hasn't testified or been subject to cross-examination. That is the first one.

To the extent then that it deals with the general planning process, I still contend that it is not a relevant document. To the extent that it is a draft document, I argue that it is a draft document, I argue that it could change.

To the extent that there is cross-reference in the Final Environmental Impact Statement, that cross-reference is specific to a limited number of pages, not to the entire document.

MR. STUBCHAER: Is this in our files?

MR. LAVENDA: Yes, it is.

MR. STUBCHAER: My inclination is to take official notice of 34.

MR. TAYLOR: Mr. Stubchaer, I am having the same difficulty Mr. Somach has here. We are dealing with a draft document. It is hearsay. It is not the kind of information responsible persons would rely on in making decisions.

The Board cannot make findings of fact based on this, I propose it is hearsay, and I think under the circumstances, there is little value in having it in the record.

MR. STUBCHAER: How can the Final EIR refer to a Draft EIR and then we rely on the final EIR?

MR. CANADAY: The problem is that staff would have to wait for the final general plan, the Final EIR for the general plan in lieu of this document.

MR. SOMACH: What I indicated --

MR. STUBCHAER: Whether or not we take notice of it?

MR. CANADAY: Yes.

MR. STUBCHAER: Mr. Somach.

MR. SOMACH: What I indicated was that all there is is a cross-reference to information, and my contention is that to the extent that what is being offered into evidence is the information that is contained within the draft document, because after all, that was what was relied on in the Final Environmental Impact Statement.

Other than my prior objections, I don't have any objections to No. 1 and No. 2. I do, however, want the most recent draft document, the one that was, in fact, referred to in the Final EIR, those pages to be the pages that are relied upon. It's just factual information that is contained in those pages.

MR. INFUSINO: I am confused. This is the Draft EIR.

MR. SOMACH: There is a supplement to it.

MR. INFUSINO: That wasn't referenced.

MR. STUBCHAER: Well, just common sense would say if you have a Draft EIR and there are supplements to it, you look back at the EIR and all the supplements.

MR. INFUSINO: If I could be provided a moment to get a copy of that and provide it to the Board, I would be happy to do so. I'm sure there is one floating around.

MR. SOMACH: I will offer to provide the Board with the pages that are referred to in the final supplement to the Final Environmental Impact Statement. I mean, I have no concern about providing you with pages that are referred to in the Final Environmental Impact Statement.

MR. INFUSINO: I have a great deal of concern about allowing Mr. Somach to decide what those pages are, that there is no clear page reference in the final. It says, and I quote: While evaluated in a general level of detail in the EIR, the secondary impacts and mitigation measures are evaluated in detail in the Draft EIR on the El Dorado County General Plan.

It does not refer to the supplemental draft and does not refer to any specific pages.

I thank him for noting the information is relevant. I would suggest that even though it is a draft document, it is reliable information on its face. This is on page 1-2 of

that document which says: This Draft EIR serves three basic purposes --

MR. SOMACH: I withdraw my objection. I am adamant that this hearing -- I don't care, if he wants to put it in, he can put it in.

MR. STUBCHAER: My inclination which will be my ruling is we will take official notice of this document and the supplement if they are on file with us.

MR. INFUSINO: If there are no further objections, I will merely offer as --

MR. STUBCHAER: The same applies -- well, that will be my ruling on 29, 32, 34, 35 and 36.

MR. SOMACH: You are going to take official notice?

MR. STUBCHAER: We are taking official notice, that is what I said. And I said 34, any supplements to it that are on file with us we are taking official notice because this is in our file.

MR. INFUSINO: So that deals then with the list of nine that you have taken official notice of?

MR. STUBCHAER: The first four we are not taking notice of, the last five we are.

MR. INFUSINO: Okay. Just for purposes of the record so I make sure we are clear here, 4, 25, 26 and 27 were not allowed into evidence?

MR. STUBCHAER: Yes.

MR. INFUSINO: Twenty-nine, 32, 34, 35 and 36 were accepted by reference but --

MR. STUBCHAER: We are taking official notice of those documents.

MR. INFUSINO: But not entering them into evidence for purpose of making findings?

MR. TAYLOR: Correct.

MR. STUBCHAER: Right.

MR. INFUSINO: And closing statements follow in the order that we presented our cases in chief; is that correct?

MR. STUBCHAER: Yes.

MR. INFUSINO: Then I will hold my closing statement

--

MR. STUBCHAER: Next -- I can anticipate the answer, but does El Dorado Irrigation District wish to put on evidence in protest to competing applications?

MR. SOMACH: No. What I would like to do is make a quick statement.

Because our applications include a request for all of the available storage in the various lakes, there is none left for others, and as a consequence, there is a clear conflict that appears in the context of the applications.

Our affirmative case in terms of support of our applications directly then deals with the question of impacts of other potential appropriations on our own applications.

Rather than providing direct testimony, what I would like to do instead is merely have Mr. de Haas and Mr. Alcott's statement introduced as policy statements along with Exhibit 6. Those are 4, 5 and 6, and 6 only to the extent that it was cross-referenced in 4 and 5.

I would, however, like to except from those policy

statements references to Kirkwood Associates based upon the agreements that were talked about before.

With respect to the applications and petitions of Kirkwood Meadows PUD, Alpine County and Amador County, my comments are going to be very brief.

Our protest focuses on the following at this point:

First, Kirkwood Meadows PUD and Alpine County have on effect, in our view, by not presenting any affirmative testimony in support of their applications and petitions for consumptive use, and in that context asking for a stay, effectively abandoned those applications and petitions.

We believe that the State Board must act accordingly and reject them at the point of decision that the Board makes.

Second, with respect to the same applications and petitions that are defective for lack of any proper environmental review, as stated by Mr. Turner during the cross-examination last Wednesday, the only environmental review conducted was a notice of exemption for about six acre-feet of water.

As noted in our letter to the State Board, 9/20/95, this does not provide the State Board itself with the proper and necessary environmental documentation in order to support the grant of a consumptive-use permit.

In this context it was also of note that Mr. Pemberton in an amazing bit of candor indicated that this application was for the purpose of affording an existing unlawful diversion, which I assume at this point in time continues nonpermitted.

Third, to the extent that these applications and petitions, as well as those of Amador County, seek to obtain rights to water for instream purposes. Without diversion specific for those purposes, no right can be granted under California law. This issue is dealt with in detail in our letter to the State Board dated 9/20/95.

And finally, none of the applicants has the required access agreement to allow them to either divert water from these facilities or to retain water in them.

Again, this matter was dealt with in some detail in our letter to the State Board dated 8/15/95. That letter cross-references a letter that I wrote of May 5, 1995. I note in this regard that Alpine's statement on cross-examination of what they wanted was that the State Board have control of the ability to make releases or prohibit the release of water from the lakes.

This also is not appropriate, as we have indicated prior to this time, since it is FERC and not the State Board that has control over what is and what is not released from these lakes.

Thank you.

MR. STUBCHAER: Thank you, Mr. Somach.

No exhibits, no cross-examination. All right.

Mr. Gallery.

MR. GALLERY: In keeping with the desire to finish here, I think I will just respond briefly to Mr. Somach's comment by way of a close in support of Amador's applications.

MR. STUBCHAER: Just a moment. That would be your closing statement?

MR. GALLERY: Yes.

MR. STUBCHAER: It isn't time for closing statements yet. We aren't done. We have rebuttal.

MR. GALLERY: That is correct. It seemed timely --

MR. STUBCHAER: It may be timely, I agree.

Mr. Baiocchi.

MR. BAIOCCHI: Mr. Stubchaer, will we have the availability of submitting written closing statements?

MR. STUBCHAER: Yes. It was so stated in my opening remarks that we would accept oral and written closing statements.

MR. BAIOCCHI: Thank you.

MR. STUBCHAER: Who has rebuttal testimony to put on? Mr. Birmingham and Mr. Volker. Anyone else in the back there?

How much time would you require, Mr. Birmingham?

MR. BIRMINGHAM: About two minutes.

MR. STUBCHAER: Mr. Volker?

MR. VOLKER: Ten to fifteen.

MR. STUBCHAER: We are going to have a 15-minute time limit and if people can use less, it would be appreciated.

MR. BIRMINGHAM: Are we going to take the shortest first?

MR. STUBCHAER: Do you guarantee three minutes?

MR. BIRMINGHAM: I guarantee a minute and a half.

MR. STUBCHAER: I am going to give you three.

MR. BIRMINGHAM: You know me well, Mr. Stubchaer.

MR. STUBCHAER: Well, I know everybody.

Mr. Birmingham, rebuttal.

MR. BIRMINGHAM: I would like to call Robert Alcott as a rebuttal witness. I believe he is still here.

MR. ALCOTT: I believe he is.

DIRECT EXAMINATION ON REBUTTAL

by MR. BIRMINGHAM:

Q Mr. Alcott, during the examination of Mr. Ottemoeller yesterday, Mr. Somach asked Mr. Ottemoeller a question about the service area of El Dorado Irrigation District being within the area which is tributary to Folsom Lake.

Do you recall him asking that question?

MR. ALCOTT: A Vaguely I do, yes.

Q It is correct, isn't it, Mr. Alcott, that a portion of the service area which is in the place of use of the pending applications is, indeed, outside of the areas which are tributary to Folsom Lake?

A I think I want to answer your question affirmatively, but would you restate it?

Q Let me ask in a nonleading way, are there any areas within your service area which are in the place of use of the pending applications which are outside of the areas tributary to Folsom Lake?

A I will answer your question this way: EID service area is supplied with water from two watersheds, the American River watershed and the Cosumnes River watershed, and it is our service area that is the subject of the pending applications.

Q And that portion of your service area which is served by Cosumnes River, or that watershed, is, indeed, outside of the area tributary to Folsom Lake?

A I am not sure if it's me or you, but I am not following you.

Q Maybe I can use --

MR. STUBCHAER: He could say, is a portion of your service area outside the American River watershed?

A Yes. Thank you.

MR. BIRMINGHAM: Thank you very much. No further questions.

MR. STUBCHAER: Mr. Birmingham, I think you pulled a fast one. Rebuttal is usually with your own witnesses.

MR. BIRMINGHAM: It need not be. In fact, I have obtained subpoenas from the State Board to call rebuttal witnesses in the past.

MR. ALCOTT: I would like the record to reflect that I was very cooperative.

MR. STUBCHAER: Mr. Volker.

MR. VOLKER: I would like to call Dr. Robert Curry as a rebuttal witness for the protestant League to Save Sierra Lakes.

DIRECT EXAMINATION ON REBUTTAL

by MR. VOLKER:

Q Dr. Curry, you took the pledge earlier; didn't you?

MR. CURRY: A Yes, I did.

Q Have you examined El Dorado Exhibit 78?

A I have.

Q During the course of your review, did you determine that some of the information presented in the tables annexed to that exhibit was in error?

A I did.

Q Did you display some of those errors in an exhibit marked Rebuttal EDCWA 78, 1995 SCLDF Exhibit RC 46?

A I did.

Q Did you display additional errors that you found in El Dorado Exhibit 78, in exhibits marked rebuttal in EDCWA 78, Table 7.5, 1995, SCLDF Exhibit RC 47?

A I did.

Q Would you please explain those exhibits? Let's start with Exhibit 46, which relates to Table 7.2 of El Dorado Exhibit 78.

A Yes. The analysis of these tables for the particular years was aided by looking at the actual flows within those years and the actual releases. We note that there is a consistent pattern here where the flows of water released from the lake do not include the fish-flow releases as presently required, but the diversions and rediversions at Kyburz do include the required fish flows.

So, what we did was go back through and rework the tables in such a way that we included the unreported required fish flows from the lakes and included that within the analysis, and looked at the excess water that was being supplied in the way that the table was put together in the downstream area at Kyburz.

Effectively what has been done here is that a phantom reservoir of about 11,000 acre-feet has been created in the

watershed above Kyburz.

For the participants who may not be as familiar with your Table 7-2, perhaps it would be useful to take them through your analysis line by line directing your attention to the second large block on Table 7.2 entitled Reservoir Releases and Direct Diversion Available to Meet EID's Demands.

A Okay, and starting with Silver Lake at the top of that block, we see the values of reservoir releases of 208 in January, 462 in February, 102 in March, and if you will refer to the rebuttal table, you will see that, in fact, the amount required for fish releases in March is not met by 102 acre-feet but, in fact, we require 123 acre-feet, so there is a shortfall in the release from the lake of 21 acre-feet.

The significance of this then is that the appearance of the lake levels in the upper portion of this chart is correct. The lake levels do reflect the historical operation, but don't reflect what would be the new operational parameters.

Q In the event the FERC minimum flow requirements were met?

A Correct.

Q Now, would you show us or explain your analysis similarly with regard to the next line, Caples Lake outlet?

A Yes, the Caples Lake outlet numbers are shown on my rebuttal diagram at the top line there. Those that are marked shown are those taken directly from the table, whereas, the FERC minimum flows are those that are shown and that meet the FERC requirements, so in the months of January and February we see that the amounts shown do meet the FERC requirement, but that in March the amount shown is 73 acre-feet short of the FERC requirements. In the month of April, it is 110 acre-feet short of the FERC requirements. In the month of May it is 60 feet short of FERC requirements, giving us a total of 243 acre-feet of shortage that would have had to have been released in the operational model that is being put forth.

Q And with respect to the third series of three rows of figures on your Exhibit 46, which is titled Kyburz Below Diversion (River), could you explain for us how that relates to El Dorado Exhibit 78 on Table 7.2?

A Yes, here in the diversion and rediversion at Kyburz we see the opposite factors being included here. We see in Table 7.2 that the first line shows us 3,000 acre-feet below diversion, which would indeed be the amount that was required for fish flows. That is why it comes out the even amount, 3,000 acre-feet, but the actual flow in 1975 was 467 acre-feet, thus the amount of reregulation of the lake levels would, in fact, reflect a very different level than would be the case if those fish flows were being released.

For February we are given the amount, 3,000 acre-feet, and the actual flow was 1,327 acre-feet for an excess amount of water that is indicated here of 1,673 acre-feet.

For March the amounts are accurately portrayed.

For April they are off by in excess of 2 acre-feet.

For May there is an excess padded amount here of 23 acre-feet, for June 25 acre-feet, for July 400 acre-feet,

for August 1,713 acre-feet, for September 1,546 acre-feet, for October 2 acre-feet, for November 1,126 acre-feet and for December 2,260 acre-feet, for a total flow in excess of that which would actually have maintained the lake levels as shown in this operational table of 10,907 acre-feet, and when you total up the under-reporting for the releases from the lake with the over-reporting downstream, we come up with a net volume for the average year, 1975, of 11,171 acre-feet of flow that is a phantom flow. It is a phantom amount of water.

Q You referred to that as an average year and that is El Dorado's characterization?

A Characterization of 1975 as an average year.

Q Would you take us quickly through rebuttal to 7.5 which is marked Exhibit RC 47?

A Yes, here in the dry-year situation we have the amounts shown as being released during 1977 from Silver Lake. In the middle of the table we show 47 acre-feet being released. In fact, the FERC minimum is 123 acre-feet for that month, giving us a shortfall of 76 acre-feet.

For February 27 acre-feet is indicated. The actual amount required is 111, for a shortfall of 85; and then working your way across the entire year, you come up with a shortfall of 273 acre-feet for Silver.

You come up with 1,170 acre-feet shortfall for Caples, and you come out with an excess flow as reported at Kyburz of 4,593 acre-feet for a phantom reservoir involving 6,038 acre-feet.

Q During the course of your review of El Dorado Exhibit 78, did you determine that additional figures presented in the tables to that exhibit were in error?

A There are some other figures in Table 7.2. I did not determine additional errors in 7.5, but in 7.2 the amounts reported as the actual flow shown for Silver Lake, for example, for the months of July, August and September, are over-reported in comparison to what the USGS shows for a net excess flow of 801.5 acre-feet accruing to the applicants here from that error.

Q Have you reviewed flow records for Pyramid Creek to ascertain whether during the history of records for that stream the FERC minimum flow of two second-feet has been met?

A I have.

Q What are your findings?

A My findings are that based upon Pyramid Creek flow records of approximately one-third of the years in September have average monthly flows of less than two cfs required flows for September.

For October the same approximate percentage, one-third of the years are less than required, but those years are different years, so when we look at the total number of years, 11 out of 24 years have records showing that fish flows were not being released for 45 percent of the years.

Q Did you review flow records of the South Fork River below Kyburz during the period of record to ascertain whether the FERC minimum flow requirements for that location have been met historically, bearing in mind that the flow

minimums established by FERC were adopted in the 1980s, and many of the years, of course, preceded those new FERC minimum fish flows?

A Yes.

Q Did you prepare a rebuttal exhibit marked SCLDF-RC-48 which addresses the question whether South Fork American River flows at Kyburz historically satisfied current FERC minimum flow standards?

A Yes, I did.

Q Does that exhibit accurately reflect the information that you have compiled with regard to that question?

A It does. This is for the month of August that I have analyzed in this particular flow record.

Q Will you summarize that information.

A Yes. For the dry-year requirements at Kyburz, which are 18 cfs, we see that in 29 percent of the 58 years of record we have met those requirements. The remainder, the 79 percent, we did not meet those requirements.

For the wet-year flows 8.6 percent of the years met the requirement of 50 cfs. The other years did not.

MR. VOLKER: Thank you. I have no further questions.

MR. STUBCHAER: Thank you. Before you leave, we will see if there is any cross-examination.

Anyone besides Mr. Moss wish to cross-examine?

MR. SOMACH: Let Mr. Moss go first.

MR. STUBCHAER: All right, Mr. Moss.

CROSS-EXAMINATION

by MR. MOSS:

Q Doctor, did you review the FERC license for Project 184 which has been in the record since the initial hearing as PG&E Exhibit 2?

MR. VOLKER: Objection, I believe that exhibit was not served on the majority, perhaps all of the parties, in the 1993 proceeding. I know that we did not receive PG&E Exhibits 2 and 3 at that time, I believe, because of their voluminous nature, that copies were provided only to the Board and perhaps a few parties.

So, to the extent the question suggests otherwise, I would object to it.

MR. STUBCHAER: He asked, did he review it.

MR. VOLKER: The question also said the exhibit that was distributed to the parties in the 1993 hearings, and I think that mischaracterizes what happened in the 1993 hearing.

MR. MOSS: To the best of my recollection, all four of PG&E exhibits were served on everybody. I can go back and find a record of that.

Now, if they do not have it, we are happy to provide them with an additional copy recently, but they did not ask for that until just the other day, so our understanding is that all four exhibits were, in fact, copied and served on everybody.

MR. STUBCHAER: Also, he can answer whether or not he has reviewed that particular exhibit.

A I believe I have reviewed part of it.

MR. MOSS: Q For instance, have you reviewed the part since you have testified just now on what is required

by FERC as a minimum release from various lakes of Project 184? Have you reviewed that?

A I have reviewed that very recently with data from PG&E, to get that updated.

Q Well, I would like to read from, and this is in the record. Unfortunately this does not have sequential page numbering, but I will show the page, and this is the instruction and they refer to it as Medley Lake and Pyramid Creek, and it says here: Minimum release of two cfs except when reservoir usable storage is exhausted or limited by operating conditions.

A Yes, I read that and I even called Fish and Game and FERC to try to understand what that was. I went to the FERC office, went through the files to try to understand the basis behind that, how we could come up with the requirement that was there except when it was inconvenient.

And it looks like there was some kind of compromise that was done along the line, but that is, in fact, exactly what it says. It says when the flows fall below the required flow.

Q I can represent in countless situations that I am aware of where it requires the minimum flow to be maintained from storage, or when that is exhausted, whatever the natural flow is, and you can certainly read this as the natural flow when, in fact, storage is exhausted.

Would you not agree that is a reasonable interpretation?

MR. VOLKER: Objection, calls for an opinion of law.

MR. STUBCHAER: I don't think so. I think he can answer that.

A My answer would be that an equally common method of creating this thing is that when an applicant goes into create a storage reservoir, required flows are maintained through a period of time that would not be the normal low-flow period of time, so that you compensate for the damage done to the fishery resource by the additional late summer flows. That, I would say, was a more common form of requirement.

MR. MOSS: Q Well, suffice it to say that our interpretation was different than yours. When you have said that we are in violation, could I ask you to re-examine the use of the word violation when, in fact, you have agreed that what I read would allow us when, in fact, usable storage is exhausted to, in fact, have a flow of the natural water.

MR. VOLKER: Objection. I believe that statement mischaracterizes the testimony of the witness. He did not agree with that characterization of the requirement.

MR. STUBCHAER: Well, the answer is on the record.

MR. MOSS: I have more question.

MR. STUBCHAER: Okay.

MR. MOSS: Q One more question and that is in regard to your revision, the document that you handed out, RC 46, I can say that PG&E is, frankly, muddled and confused by this and we would object to it being entered for anything.

And one of the things that I would like to just ask about this is where you represent what is titled FERC

Minimum Flows, are you actually saying that there is a legal requirement, for instance, let's take the first one, Silver Lake, in January, that there is a FERC required flow of 208 acre-feet in that month?

A Let me check momentarily my notes. No, I am not saying that. FERC minimum flow is indeed a piece of shorthand to get it in the spreadsheet this morning at two o'clock. We really mean the FERC minimum flows plus the actual flows.

Q If the actual flows exceed the FERC minimum flow of two cfs, it represents a total for the month of January of approximately 62 acre-feet.

Isn't that correct?

A One hundred twenty-three acre-feet, I believe.

MR. STUBCHAER: One cfs is two acre-feet in a day and so you got two cfs, that's four acre-feet in a day, so it's 128 acre-feet in a month.

MR. MOSS: Well, in any case, it is not as represented here, 208.

MR. STUBCHAER: If the minimum flow is truly two cfs, it is not 208 -- I'm sorry, I shouldn't testify.

MR. MOSS: The fact is, and I think you just basically said, is that this second column, FERC minimum flow, is basically a repetition of the top column and it should be deleted because it doesn't represent the actual FERC minimum flow.

MR. VOLKER: That's not what the witness said. I object to this continuing line of inquiry mischaracterizing the witness's testimony. The witness has testified that the second row merely provides the actual flow if it exceeded the FERC standards, and if it did not, it furnishes the FERC minimum flow requirement in place of the actual but deficient flow for that month.

MR. STUBCHAER: We will take that to be a footnote to the table.

MR. MOSS: No further questions.

MR. STUBCHAER: I was going to say -- I was going to have a similar question.

Mr. Somach.

CROSS-EXAMINATION

by MR. SOMACH:

Q Without belaboring this last point, I want to confirm that, in fact, FERC minimum flows are whatever are provided by FERC; is that correct?

A Well, FERC doesn't provide water, they provide standards.

Q I mean the flow minimum requirements.

A Okay.

Q Is that correct, it's whatever is provided for in the FERC license and orders amending those licenses; is that correct?

MR. VOLKER: Excuse me. This is a little confusing because we have a row in his exhibit which bears the title FERC Minimum Flow, which is the same expression you used in your question.

Are you referring to the exhibit?

MR. SOMACH: I am trying to just confirm that the

line that says FERC Minimum Flow is not, in fact, the minimum flow required by FERC.

MR. VOLKER: I think we have been over this ground repeatedly, but I will let the witness clarify further.

A It is the minimum flow required by FERC when the actual flow does not meet the FERC minimum flow. It is the actual flow when it is met by the actual flow.

MR. SOMACH: I actually may have understood that and I am really troubled. Let me refer to June to see, you see June there, and let's move down to Kyburz. Let's take a look at the minimum flow, what you say is FERC minimum flow, which is stated as 103,724 acre-feet.

Q Did I read that right?

MR. VOLKER: I think this is -- it's very clear what the witness has presented in the rows. He has testified that in order to fit a title on the spreadsheet, he abbreviated the information that is presented. He has now answered the same question several times.

MR. STUBCHAER: No, this is a specific question that is not abusive at all. He is trying to understand what the numbers are in June. I won't complete your question, but I can anticipate what it is.

MR. SOMACH: I am just trying to understand, believe this or not, Mr. Volker. All I am saying is when you use that figure 103,724 for that month in that column labeled FERC Minimum Flow, is what you are saying is that was the actual flow that existed at that point?

A 103,699 is the actual flow -- I'm sorry, which column are we on?

MR. SOMACH: Q I am looking at June, Kyburz below diversion, river; in other words, the river flow, it says, and I am going to put in the quotes, it is something else, FERC Minimum Flow. There's a figure there, 103,724, that number and I am not even saying that you are saying that that is it. That number could not, in fact, be the minimum flow.

Can you tell me what constitutes the number 103,724?

A Yes, that's the number taken from Table 7.2 of EDCWA Exhibit 78. That is the Kyburz below diversion, river indicated, amount. And what I have looked at is what the actual flow was; in other words, what this table does is it exaggerates the amount of water in the river in comparison to what was actually in the river by 25 acre-feet. So, I took that 25 acre-feet back and put it into this imaginary reservoir that we are --

Q Okay, so the 25 acre-feet, where are you saying the 25 acre-feet, in fact, went?

A The 25 acre-feet never existed according to the USGS records. The 103,724 that is in the table of Exhibit 78, is a number that isn't correct in comparison to the USGS datum.

Q Well, where did you get the numbers that are the actual flow numbers? Where did those numbers come from?

A They came from the USGS Survey database that you and PG&E and others have supplied.

Q Under your shortfall numbers, just very quickly, is what you did add shortfall under Silver Lake with shortfall under Caples Lake and shortfall under Kyburz to reach those

numbers that are down below?

MR. VOLKER: Excuse me, actually that is a little confusing. There is no shortfall under Kyburz. There is the opposite, padding.

MR. SOMACH: Q What did you do? I am just trying to figure out how you got this total padding number.

A I added the shortfalls, the monthly shortfalls under Silver Lake and Caples Lake to the excess flow indicated for Kyburz to show the total amount of water that had to somehow exist in the river between Caples Lake and Kyburz, that wasn't there.

MR. STUBCHAER: Can I interrupt? Of course I can, I'm the hearing officer.

MR. SOMACH: But it makes me feel good to say certainly, I give you permission.

MR. STUBCHAER: I look at the differences that you are referring to here, the so-called padding, and in some cases it's well within the accuracy of gaging or measuring water. And if we rounded them to a reasonable number or the three digits, or something like that, these differences would not appear. That's not true in all months but it certainly looks like it is true in June, so if you are referring to the USGS for the actual flow and the FERC minimum flow, I thought that's what I heard you say; why aren't they the same numbers?

A Excuse me, Mr. Chairman, the FERC minimum flow is the one taken from their table. I just transferred --

MR. STUBCHAER: They are more than the cfs times the two times the number of days you used than what it actually was.

A Correct.

MR. SOMACH: Q In looking at Exhibit 78, are you aware of the fact that the historic hydrologic record was adjusted to reflect the current streamflow requirements at Kyburz below the El Dorado diversions. That's what that says.

A I am aware of that and that is why it shows 3,000 acre-feet when, in fact, it was only 467 acre-feet.

Q Okay, so you are aware Tables 7.2 and 7.5 had footnotes which explained exactly what adjustments were made; is that correct?

A It explains exactly what adjustments were made to the Kyburz flow.

Q Let me ask you this question: Is it your testimony that the numbers which are, I guess on the far right of these exhibits, simply never got down to Folsom?

A That is not my testimony.

Q What does that number reflect then?

A That number reflects the amount of water that has to be supplied between the lakes and Kyburz to make the volume of water required match the volume of water which was actually there, and it, therefore, allows us to understand how much water is necessary to supply through reregulation of the lakes, through reoperation of the lakes, through operation of the lakes in a fashion different than the historical operation.

MR. SOMACH: I have no further questions then.

MR. STUBCHAER: Staff.

MR. LAVENDA: No questions.

MR. STUBCHAER: That concludes the rebuttal and recross-examination.

Next on the list would be closing statements.

Now, we have provided for oral and written closing statements. Does anyone want to suggest that we just have written closing statements?

MR. BIRMINGHAM: So moved.

MR. STUBCHAER: Is there a second?

MS. LENNIHAN: Second.

MR. STUBCHAER: Mr. Gallery, you don't look enthusiastic.

MR. GALLERY: Well, I guess that would be all right.

Did I correctly understand that Mr. Somach withdrew the testimony of Mr. Alcott and Mr. de Haas and was just relying on policy statements, and I can respond to that in a written closing statement or brief.

MR. STUBCHAER: I promise that the written closing statements will be read and considered just as if they were oral, even more so.

MR. GALLERY: By Mr. Stubchaer himself?

MR. STUBCHAER: Right, exactly.

MR. INFUSINO: Before you close the hearing -- I don't have a problem with waiving closing statements. I want the Board to know that Quality Growth does object to the exclusion of what we feel is critical evidence from the record, and we feel it has prejudiced our ability to make a case before the Board.

I just wanted that noted for the record.

MR. STUBCHAER: Your objection is noted and is on the record.

Mr. Taylor, before I make any closing statements, do you wish to say something?

MR. TAYLOR: Sierra Club rebuttal exhibits have not been offered into evidence.

MR. VOLKER: Thank you, Mr. Taylor.

I would like to move Exhibits RC 46, 47 and 48 into evidence,

MR. STUBCHAER: Are there any objections?

I would just like to say that they have to be read with the hearing record to explain what they really are.

Hearing no objection, they are received.

MR. VOLKER: Mr. Stubchaer, perhaps due to lapse of judgment, earlier I had agreed to defer my opening statement in order to permit our witnesses from Alpine and Amador Counties to complete their testimony. I forget what day it was and at that point thought I was reserving time for a policy statement to be made at the close.

Now, I have a few notes here, and I probably could work through this in five minutes, but I feel that I should summarize the testimony and exhibits quickly, at least the high points.

MR. STUBCHAER: In a closing statement, it's kind of --

MR. VOLKER: Well, I was entitled to an opening statement and I asked for leave to present it after our

presentation rather than before in order to permit all the witnesses to get on and off that day.

MR. STUBCHAER: I appreciate that but you have now heard all of the evidence and you can't help but mix up what you have heard during this testimony with your opening statement, so it will be a closing statement you are proposing to make, and that ought to be in writing.

MR. VOLKER: All right, I will do that.

MR. STUBCHAER: Thank you for being so gracious and not arguing.

MR. VOLKER: Well, due to the lateness of the hour and the fact that I am outnumbered by everyone in the room.

MR. STUBCHAER: And also, what could happen to you on the way home.

MR. VOLKER: I am eager to enjoy some treats rather than the tricks that I have been receiving all day.

MR. STUBCHAER: Anything else before I read the closing statement, Mr. Taylor?

MR. TAYLOR: I think we need to set a time for submitting closing briefs, and staff would recommend that the closing briefs be due 20 days after the mailing of the transcripts from this hearing.

MR. GALLERY: I want to request that we have 30 days instead of the 20 days, Mr. Chairman. We have got an awful lot of exhibits and we really have to go back to the exhibits from the last hearing, so there would be a lot of work involved.

MR. STUBCHAER: Did you hear the qualifier in Mr. Taylor's recommendation?

MR. GALLERY: Yes, I understand he would tack the 20 days onto the end of obtaining the transcript, but even with the transcript, that's all the more reason once you get the transcript, that 30 days would be a big help, at least to me.

MR. STUBCHAER: Mr. Somach.

MR. SOMACH: We believe that 20 days from the point when the transcript is mailed is an appropriate time. We are anxious to move forward with this process as expeditiously as possible.

MR. STUBCHAER: I think the exhibits can be reviewed while the transcript is being prepared and I will make it 20 days.

All right, the State Board will take this matter under submission. All persons who participated in this hearing will be sent a notice of any State Board action on this matter. You will receive a copy of the State Board's decision.

Thank you all for your interest, cooperation and participation in this hearing.

This hearing is adjourned.

(Proceedings completed)

63

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